

BETWEEN

ADK

APPLICANT

AND

ZWP

RESPONDENT

Date of Order:

17 November 2011

Referee:

Referee A Davidson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Respondent, ZWP, must pay the Applicant, ADK, \$5,574.56 (including GST) within seven days of the date of this order.

Facts

[1] On Wednesday 16 March 2011, ADK provided ZWP with an overview of costs to undertake landscaping and gardening work at her home in Auckland. The costs overview was incorporated in an email entitled "Garden quote". ADK maintains his email was an estimate. The total price for the work described in the email came to \$2,450.00.

[2] ADK undertook pruning, clearance and lawn repair work on 17 and 18 March 2011 for which he invoiced ZWP \$725.00 (incl GST, if any) on 20 March 2011. \$350.00 (incl GST, if any) of the invoice related to pruning and clearance work not specified in ADK's email of 16 March 2011. \$375.00 (incl GST, if any) of the invoice related to lawn repair, which was specified in ADK's email of 16 March 2011 (where it was said the cost of lawn repair would be \$425.00 (excl GST)). ZWP paid the \$725.00 to ADK on 23 March 2011.

[3] Several days after sending his email, ADK contacted ZWP to say that he had forgotten to include GST in the figures provided and that they should be considered GST exclusive. Adding GST to the original amounts specified in ADK's email of 16 March 2011 increased the total cost of the work specified to \$2,817.50.

[4] ADK subsequently began the work set out in the "Garden quote". Additional work was requested and there was no discussion as to the price for the new work. As the work progressed, ZWP asked if the project was going to budget and was told that it was. On the final day of work, ADK said that the project was a little over budget. On 15 May 2011, ADK invoiced ZWP \$6,908.00 (incl GST) for the work undertaken. ZWP has refused to pay saying amount invoiced exceeds the agreed amount.

Issues

[5] The issues are:

- (i) Was ADK's email of 16 March 2011 setting out the cost of various items of work a quote or an estimate?
- (ii) Are the costs set out in ADK's email of 16 March 2011 inclusive or exclusive of GST?
- (iii) Can ADK charge more than he indicated for work specified in his email of 16 March 2011?
- (iv) Can ADK charge for work undertaken that was not specified in his email of 16 March 2011?
- (v) Has ADK conducted himself in a misleading or deceptive manner?

Law

[6] The relevant law is the law of contract, s 13 of the Fair Trading Act 1986, and s 31 of the Consumer Guarantees Act 1993.

Decision

Quote or estimate?

[7] ADK's email of 16 March 2011 was entitled "Garden quote". By using the term "quote" in the subject line ADK created a presumption that what he was providing was a quote. A quote is a firm offer to provide certain goods and services for a fixed price. In format and content, a quote is often similar to an invoice. If accepted, the effect of a quote is to create a fixed price contract for the specified work.

[8] The language of ADK's email is indefinite. It is conversational, proposing options, suggesting alternative plant choices, and providing approximate prices or price ranges. I find that it lacks the certainty necessary to actually be accepted as a quote – that is, a definite scope of work to be undertaken for a definite price. In truth, it lacks the specificity that I would expect to even see in an estimate and most properly could be considered something more preliminary even than an estimate, such as a proposal. ZWP accepted ADK's email, however, and so it forms the basis of the contract between them. As it lacks the specificity of a quote, I find that it must be considered an estimate.

Inclusive or exclusive of GST?

[9] ADK's email of 16 March 2011 does not specify whether it is inclusive or exclusive of GST. There is no legal requirement for prices to be specified inclusive or exclusive of GST. However, provisions of the Fair Trading Act 1986 amongst others would provide that pricing must not be presented in such a way as to be misleading or deceptive, or to misrepresent the actual cost of the goods or services.

[10] ADK eventually clarified that the prices specified in his email were exclusive of GST. He had already undertaken two days work at that point but only a portion of that work related to the work specified in his email. That is to say, ADK put ZWP on notice before undertaking the work specified in his email of 16 March 2011 that the prices set out in it were exclusive of GST. At that point, ZWP had an opportunity to abandon the work due to the change in costs. ZWP did not do that, however, and she agreed to continue with the work.

[11] On this basis, I find that while the GST basis was not initially clear from ADK's email, he clarified it and ZWP accepted his advice that the prices were GST exclusive. Accordingly, the prices set out in ADK's email of 16 March 2011 should be considered GST exclusive for the purposes of this decision.

Work specified in the email of 16 March 2011

[12] The flow on effect of my finding above that ADK's email of 16 March 2011 was an estimate is that ADK is not bound to charge exactly the prices specified in his email to ZWP. In the case of estimates, the actual price charged is calculated in accordance with the amount of time and materials actually required to undertake the work. While the actual price may be based on time and materials, it cannot depart wholly from the original estimate. Estimates are required to be a genuine pre-estimate of the likely costs based on the estimator's skill and experience. In practice, this typically means that the final cost would not be expected to vary from the initial estimate by more than 20 per cent. In his email of 16 March 2011, ADK estimated that the specified work would cost \$2,817.50 (incl GST) and, as this was an

estimate, ADK could continue with the work even if it appeared the cost may exceed the estimate by a little provided the increase in cost was not greater than 20 per cent.

[13] Paragraphs two and three of ADK's email refer to what both parties describe as the "side garden". ADK said in his email that putting in drainage, white chip, mondo grass, five plants, and bark chip would cost \$725.00 (excl GST), and including GST \$833.75. Ultimately no wood chip was used and ADK's invoice for the side garden was for \$1,300.00 (excl GST), and \$1,495.00 including GST – \$661.25 more that set out in his email. The variation was explained by ADK at the time, and materials were needed to construct three steps that were not included in the initial scope of work. ZWP argued that the steps had been discussed and were included in the initial scope of work. However, they are not specified in ADK's email and there was no other evidence available to show that they were. On the balance of probabilities, I find that the three steps comprised new work.

[14] ADK's invoice did not provide a breakdown between the end cost of the original work and the three steps. There is no evidence to suggest that the originally scoped work cost more or less than anticipated. On this basis, I find that of the \$1,495.00 (incl GST) invoiced for the side garden, the amount originally specified of \$833.75 (incl GST) should be allocated to it. As this amount is in line with what ADK initially estimated, I find that ZWP must pay this amount. The balance of \$661.25 (incl GST) must then be attributed to the three new steps, which I will address in the next section along with other work not specified in ADK's email.

[15] In paragraph four of ADK's email, he states that he could remove a large Nikau for \$200.00 (excl GST) including tip fees, which is \$230.00 (incl GST). ADK eventually charged \$230.00 (incl GST) for removing the Nikau, which I find that ZWP must pay as it is the same as ADK's initial estimate. ADK's email refers to what the parties describe as the "front garden". This was initially estimated to cost \$345.00 (incl GST) and eventually invoiced to be \$690.00 (incl GST). Although box hedging was referred to in the email, none was eventually used. ADK explained that the variation was due to the need to remove clay, and for larger and more Renga Renga plants. ADK estimated that this work would cost only \$345.00; however, it eventually cost nearly twice that. While more Renga Renga was

required, I note that no box hedging was ultimately required. In the end there has been a large variation in the cost of the work and no discussion held with ZWP. If ADK believed that more and larger Renga Renga were required, and that this is something he wished to charge ZWP for, then he should have sought her agreement before purchasing them. Similarly ADK should have discussed the removal of the clay if it was going to increase the cost of the job. I find that ADK cannot charge ZWP the full cost of the variation: he is bound by his initial estimate and as such only entitled to a variation of 20 per cent. On this basis, I find that ZWP must pay ADK \$414.00 (incl GST) for the work on the front garden comprising the initial estimate of \$345.00 (incl GST) plus 20 per cent.

[16] Paragraphs six and seven of ADK's email refer to what the parties describe as the "lower bed". This was initially estimated to cost \$230.00 (incl GST) and eventually invoiced to be \$632.50 (incl GST). ADK indicated during the hearing that the increase in cost was due to the use of white chip instead of plants, several additional box plants and the removal of a large amount of clay. I accept that ADK undertook the work but do not accept that he is able to charge the full cost of his time and materials to ZWP. ADK indicated that half a day of labour would have been spent removing clay from the site. I find that removal of the clay should be classified as an oversight on ADK's part rather than a change in scope or additional work. ADK could easily have ascertained if any clay would need removing prior to giving ZWP his estimate, or flagged in his estimate that any clay that may need to be removed from the site would be additional. As above, if ADK wished to charge for removal of the clay then he should have obtained ZWP's approval before proceeding with the work. Additionally, paragraphs six and seven of ADK's email set a budget for this part of the garden and goes on to canvas a range of options – all presumably within the initial budget or thereabouts. It appears the conversation continued and the final option selected was not one of the options covered in ADK's email. ADK's email did, however, set an expectation as to the cost of the work in this area, and if ADK wished to increase the budget substantially then he needed to discuss that with ZWP. In the circumstances, I find that ADK is bound by his initial estimate of \$230.00 (incl GST), which he is able to increase by 20 per cent to \$276.00.

[17] Paragraph 8 of ADK's email refers to "lawn repair". ADK estimated that lawn repair would cost \$425.00 (excl GST), or \$488.75 (incl GST). ADK undertook some lawn repair

work on 17 and 18 March 2011 and invoiced ZWP \$375.00 (incl GST, if any) for lawn repair on 20 March 2011, which ZWP has paid. Of the original \$488.75 (incl GST) estimated for lawn repair, \$113.75 (incl GST) remains after ADK's March 2011 invoice is taken into account. ADK's invoice of 15 May 2011 includes a further charge of \$805.00 (incl GST) for lawn repair. ADK stated that the increase in costs arose from the need to remove a large amount of clay from the area, replacement sand and laying new lawn. It is apparent that considerably more work was required than anticipated. In ADK's words: "the original plans for light improvements had to be abandoned". There was no communication of the problems encountered with ZWP, however, and the clay problem would have been obvious from the outset had ADK undertaken some basic investigation before providing ZWP with his estimate. If ADK wished to increase the amount of his charges significantly beyond his initial estimate, he should have discussed the problems he had encountered with ZWP and agreed a new course of action and estimate with her rather than simply assume that she was able to pay any amount the work might cost. In the circumstances, I find that ZWP is entitled to rely on ADK's estimate of \$488.75 (incl GST) for lawn repair, which, if a 20 per cent allowance is applied, comes to \$562.06 (incl GST). ZWP has already paid \$375.00 (incl GST, if any) for lawn repairs and as such I find that of the \$562.00 (incl GST) for lawn repairs specified in ADK's email of 16 March 2011 only \$187.06 (incl GST) remains to be charged. This is all that ADK is entitled to charge for lawn repairs above and beyond what he has already charged and as such that ZWP need only pay \$187.06 (incl GST) rather than the \$805.00 (incl GST) specified in ADK's 15 May 2011 invoice.

[18] Paragraph nine of ADK's estimate refers to the "raised bank" or, alternatively, the "sloping bank" by the road. In this estimate, ADK stated that the bank would need planting, fresh soil and bark chip, and would cost between \$500.00 and \$600.00 (excl GST), depending on plant selection. Including GST, this amounts to \$575.00 – \$690.00. ADK eventually invoiced ZWP \$632.50 (incl GST) for this work. ZWP noted that no bark was used and no Hydrangeas planted. ADK agreed, noting that the budget for this work was impacted by the need to undertake soil improvement and clay removal, which had not been budgeted for. While ADK did not lay bark, the work specified in his estimate is by and large complete. That is to say that the bank was planted and fresh soil applied. While Hydrangeas were not planted, Teuchrium were and the estimate did not specify a specific plant type. ADK's

charges for the raised bank fall within the range of his estimate, and as such I find that it is reasonable for him to charge them. On this basis I find that ZWP must pay ADK \$632.50 (incl GST) in relation to the work undertaken by ADK on the raised bank.

[19] Summarising the above then, the amount that ZWP must pay ADK for work specified in the email of 16 March 2011 is \$2,573.31 (incl GST) comprising:

Description of work	Amount (incl GST)
Side garden	\$833.75
Removal of Nikau tree	\$230.00
Front garden	\$414.00
Lower bed	\$276.00
Lawn repair	\$187.06
Raised bank	\$632.50
	\$2,573.31

Work not specified in the email of 16 March 2011

[20] A supplier that agrees to undertake work in addition to that specified in a quote or estimate is entitled to charge for such additional work. Section 31 of the Consumer Guarantees Act 1993 provides that where the price of such additional work is not agreed ahead of time however that the supplier must charge a reasonable price. In the present case ADK undertook several jobs for ZWP that were not specified in his email of 16 March 2011, no estimate of cost for these jobs was given at any point and as such ADK is entitled to charge for the work done but obliged to charge no more than a reasonable price for the work done and materials used.

[21] As noted in paragraphs seven and eight above, I find that the three new steps in the side garden were not part of ADK's original estimate. Photographic evidence shows that in addition to the labour required, the steps also required pavers and railway sleepers. While the

cost of the steps was not broken out separately in ADK's invoice, I previously found that the entire variance of \$661.25 (incl GST) between ADK's estimate and the final cost should be attributed to the steps. Neither party produced any evidence to substantiate what the reasonable cost of constructing the steps would be. However, considering the amount of work the steps would appear to have required and the materials necessary, I accept ADK's argument that \$661.25 (incl GST) is a reasonable cost and as such that ZWP must pay this amount.

[22] ADK's invoice of 15 May 2011 refers to "skip hire". ADK explained that while this was not initially included in the estimate, it became necessary due to the additional work requested and large amount of clay that required removing. I accept ADK's evidence that the skip was necessary. However, the presence of clay was readily discoverable and any experienced garden contractor should have at least made a basic investigation to ascertain if clay was present and would have to be removed before issuing a quote or estimate. I find that ZWP was not advised of the need for a skip, and that the possibility a skip was readily discoverable. If ADK wished to charge for a skip, he should have either provided for a skip in his estimate or discussed the need for a skip with ZWP before incurring the cost. On this basis, I find that ADK is unable to charge for the skip hire.

[23] ADK's invoice also refers to the removal of a dying Pittosporum tree at a cost of \$345.00 (incl GST). Removal of this tree was new work requested by ZWP. ADK had never given ZWP an estimate of the cost to undertake this work and neither party produced any evidence as to what the reasonable cost might have been. I note that ADK had previously estimated that the removal of another tree, a Nikau palm, would cost \$230.00 (incl GST). It is not possible to compare the two trees exactly and the work required in each case; however, the amounts charged are broadly consistent. On this basis, I find that ZWP requested that the tree be removed and must pay the \$345.00 (incl GST) charged by ADK for this work.

[24] ADK's invoice refers to laying white chip and paving under the clothesline (\$1,250.00 excl GST) and putting in an additional step (\$450.00 excl GST) for a total cost of \$1,955.00 (incl GST). This was new work not included in ADK's original estimate. ADK justified the cost saying it included purchasing the pavers, white chip and a large amount of

sand. ZWP stated that she only agreed to this additional work as ADK had told her that he had purchased too much white chip. ADK disputed this. During the hearing it was helpful to see this work in a colour photograph where you can clearly see ZWP's clothesline and the pavers and the additional step below it. No price was discussed between the parties in relation to the new paving and step under ZWP's clothesline. As noted above, s 31 of the Consumer Guarantees Act 1993 provides that where the price of such work is not agreed then the supplier must charge a reasonable price. Viewing the work undertaken in the photograph, my impression is that what has been charged is a substantial cost for the visible work, particularly in the light of the one step here being said to have cost \$517.50 (incl GST) while the three steps referred to above cost a total of \$661.25 (incl GST). Neither party, however, produced any evidence to show whether or not the amount charged for the work done in this area was reasonable or not. My own impressions are not a sufficient basis for reaching a decision, however, and on the balance of probabilities and in the absence of any other evidence, I accept that the amount charged by ADK for this work is reasonable. This work was not within the scope of the work originally discussed by the parties, did not fall within the estimates previously given by ADK, and accordingly ADK is entitled to charge a reasonable price for the work done. On this basis, I find that ZWP must pay the \$1,995.00 (incl GST) invoiced by ADK in relation to work undertaken in the clothesline area.

[25] Summarising the above, the amount that ZWP must pay ADK for work undertaken which was not specified in his email of 16 March 2011 is \$3,001.25, comprising:

Description of work	Amount (incl GST)
3 new steps in side garden	\$661.25
Skip hire	\$0.00
Removal of Pittosporum tree	\$345.00
Clothesline area	\$1,995.00
	\$3,001.25

Misleading or deceptive conduct

[26] ZWP stated during the hearing that she asked ADK several times while the work was being undertaken if the project was on budget. ZWP says she was told throughout that the project was on budget and, on the last day, that it would come in just over budget. ZWP took this to mean that the entire project, old and new work, would cost around the amount of ADK's original estimate of \$2,817.50 (incl GST) or perhaps a little more. ZWP said she knew that ADK had undertaken work that was not set out in the estimate. However, she assumed that this work probably cost around the same amount as other work that had been included in the estimate but which was not done, such that the overall effect was relatively neutral. ZWP stated that she was shocked to then receive an invoice for \$6,908.00 (incl GST), more than double the original estimate.

[27] ADK did not dispute telling ZWP that the project was on budget. His view was that ZWP was enquiring not about the overall cost of the project but rather whether the subset of work that he had provided an estimate for was on budget. His response then that the project was on budget was, he felt, accurate.

[28] ZWP argued that ADK's conduct was misleading, specifically ADK's repeated assurances that the project was "on budget". ZWP argued that she would never have proceeded with the new work if ADK had been upfront regarding the total cost of the project. Misleading and deceptive conduct is governed by the Fair Trading Act 1986. The Tribunal has no jurisdiction to apply s 9 of that Act, which governs misleading and deceptive conduct generally. However, the Tribunal does have jurisdiction in relation to s 13 in relation to false or misleading representations. Section 13(g) provides that no person shall make false or misleading representations in relation to the price of goods or services:

"No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

...

(g) Make a false or misleading representation with respect to the price of any goods or services...

[29] The statement complained of by ZWP was made by ADK in connection with the supply of goods and services, and so on this basis falls within the scope of s 13(g) of the Fair Trading Act 1986. ADK claimed that the project was on budget, a representation in relation to price, which falls within the scope of the section.

[30] In order for a statement to be misleading, it is not necessary for the person making the statement to be aware that it is misleading. It is enough that an objective observer would have been misled. In this case, ZWP had budget of around \$3,000.00, which had been discussed when the parties met to discuss the work that would be done. Later in the project, although the scope of work had altered, there is nothing to suggest that ZWP's budget had also changed. In the circumstances, ADK's argument that his assurance that the project was on budget related only to the originally scoped work is unrealistic. Few, if any, customers are likely to approach the subject matter in this way. Customers want to know how much they are going to pay for the entire job. When a customer asks whether the project is on budget they are asking "are we on target for me to pay around what we discussed for the whole job". In the context of the present claim, ZWP's enquiries could sensibly have been understood to be "are we on target for me to pay around \$3,000.00 for the entire job". I find that an objective observer would have interpreted ADK's response exactly as ZWP did: that is to say, that the whole job would be completed for around \$3,000.00. Plainly, however, the overall project was likely to cost considerably more than this and on this basis I find that ADK's assurances amounted to misleading representations in respect to the price of goods and services and as such breached s 13(g) of the Fair Trading Act 1986.

[31] Pursuant to s 39 of the Fair Trading Act 1986, the Tribunal's jurisdiction to make orders in relation to breaches of the Act is restricted to the remedies specified in ss 43(2)(c) – (f). The remedies specified in s 43(2) are dependent on a person having suffered or likely to suffer a loss as a result of the conduct of another person. In the present case, the work undertaken was done at ZWP's request and the price charged has been reviewed by the Tribunal by requiring ADK to conform to his estimate and charge a reasonable price for work pursuant to s 31 of the Consumer Guarantees Act 1993. Put another way, the effect of the Tribunal's earlier findings is that ZWP will pay what she agreed to pay or what is reasonable for work that she requested be done. It is not apparent to me that ZWP can in fact be said to

have suffered be likely to suffer a loss and a loss is required in order to activate the remedies specified in s 43(2) of the Fair Trading Act 1986. Obviously not every instance of misleading conduct results in the misled person suffering a loss and that would appear to be the case here. Certainly ZWP has ended up having significantly more work done than she would have agreed to had she known how much it would cost, but that does not amount to a loss where the cost that she must ultimately pay is a reasonable one for the work that was actually undertaken.

[32] On the basis of the foregoing, I find that ADK's assurances that the project was on budget were misleading, breaching s 13(g) of the Fair Trading Act 1986. While ADK's conduct may have been misleading, I find that his conduct has not and is not likely to cause ZWP a loss and as such that the remedies specified in s 43(2) of the Fair Trading Act 1986 are not available.

Conclusion

[33] On the basis of the foregoing I find that ZWP must pay ADK \$5,574.56 comprising \$2,573.31 (incl GST) for the work specified in ADK's email of 16 March 2011 and \$3,001.25 (incl GST) for the work not specified in ADK's email of 16 March 2011.