

BETWEEN

AEF Ltd

APPLICANT

AND

ZVQ

RESPONDENT

Date of Order:

16 April 2012

Referee:

Referee Reuevecamp

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Respondent, ZVQ, must pay the amount of \$1,340.00 to the Applicant, AEF Ltd, on or before 27 April 2012.

Facts

[1] The Applicant claims that the Respondent was overdue in payment of \$11,304.60 as advised by notice in writing and by email to it on 21 February 2012. It advised the Respondent that it had invoked clause 3(c) of its Terms of Hire to the effect that it would require payment of interest as set out in that clause and that, if payment was not received by 24 February 2012, it would refer the matter for debt collection at the expense of the Respondent. It did so on 28 February 2012. The Applicant received confirmation from its bank that payment of the principal only was credited to its account on 29 February 2012. The applicant seeks payment of debt collection fees at \$1,300.00 and interest accrued at \$652.53.

[2] The respondent denies that it received the notice of 21 February 2012, or that it is liable for the debt collection costs and interest, the details of which he was not advised about until after payment was made by him of the principal. He considers that the matter was finalised on payment of the principal amount stated in an earlier invoice he received, and confirmed by the notice of 21 February 2012.

Issue

[3] Is the Respondent liable for the collection and associated costs (including penalty interest on the outstanding amount)?

Decision

[4] I accept the evidence provided by the Applicant that it sent a demand letter to the Respondent requiring payment by a specified date, and advising the Respondent it would be liable for interest and the debt collecting costs if payment was not received by that date. I accept that the Respondent's payment was not received until after that date.

[5] I also accept that on 28 February 2012 the Respondent became aware the Applicant had referred the matter to its debt collectors. This notice came by email and a telephone conversation with the debt collector. I consider it likely that this encouraged the Respondent to make prompt payment of the outstanding principal, of which it had been advised earlier, on 29 February 2012.

[6] I find that this left the Applicant with unpaid collection costs, which it is entitled to recover from the Respondent in accordance with its Hire Terms, as the Respondent did not pay the overdue amount by the date specified in the notice. I accordingly award the relevant cost at \$1,300.00 to the Applicant.

[7] With regard to the interest claimed by the applicant at \$652.53, the relevant clause reads as follows:

If the Hirer fails to pay a [.....] invoice within 7 days of the date of the invoice [the Creditor] may require the Hirer to pay, and the Hirer must then pay, interest to [the Creditor] on the overdue amount at a rate 2% higher than the Bank of New Zealand business overdraft prime lending rate from time to time calculated on the overdue sum from the date of the invoice until payment in full.

[8] I find that this text places it beyond doubt that interest is payable from 21 February 2012. However, it does not establish that without a specific requirement by the Applicant to that effect, interest accrues on overdue amounts. I find that this happens only after a requirement was implemented by the Applicant on 21 February 2012 and therefore took effect from that date.

[9] I have no issue with the fact that the Applicant could have invoked the clause at any time once the Respondent failed to pay any amount then due and payable. I have no evidence, however, that the Applicant did this prior to 21 February 2012, and I find it difficult to accept a literal interpretation of the clause to the effect that the interest would apply retrospectively to the date the first amount became overdue. If that was the case, I would have expected the Applicant's notice to have specified the amount that had already accrued prior to the date in its notice, as required by own clause 3(d)(1), which states that each of its invoices will set out all other charges payable by the Hirer for the period of the invoice.

[10] Since it did not do this, the Respondent was not aware of any interest claimed to date when it (belatedly) made payment of the amount specified in the notice on 29 February 2012. In light of this, I find that the Respondent was justified in assuming payment of the amount invoiced, subject possibly to additional debt collection costs and interest accruing after that date its payment, would put an end to the matter. Against this background, and the fact payment took place almost immediately after the requirement from the Applicant was received by the Respondent, I suggested that a retrospective application of the clause by the Applicant could well be seen as amounting to a harsh exercise of its enforcement powers, in terms of s 19(e) of the Disputes Tribunals Act, by the Applicant.

[11] Having discussed the matter at the hearing, the Applicant agreed to reduce its claim for interest to \$40.00, which the Respondent agreed to pay. I therefore award a further \$40.00 to the Applicant in respect of interest accruing after 21 February 2012.

[12] The Respondent must therefore pay the Applicant \$1,340.00. This order is without prejudice to any entitlement the Respondent may have to any credits in terms of the other provisions of its agreement with the Applicant.