IN THE DISPUTES TRIBUNAL **[2013] NZDT 196**

BETWEEN	**AET LTD**
	APPLICANT
AND	**ZVB LTD**
	RESPONDENT

Date of Order:	3 August 2013
Referee:	Referee Avia

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that AVB Ltd is to pay AET Ltd $4,224.69 on or before Friday 17 August 2013.

Facts

[1] In November 2008, AET Ltd agreed to supply and fix sealant to the joints in a building built by ZVB Ltd.

[2] AET Ltd completed the work and sent ZVB an invoice. ZVB paid 75 per cent of the invoice in January 2009.

[3] At first, the remainder of the bill was not paid as cash flow was tight due to ZVB Ltd restructuring the business. Secondly, in 2009 or early 2010 ZVB Ltd architect found a joint he thought was spongy. From that point on, ZVB Ltd refused to pay the outstanding amount because it believed the sealant might not been applied to the correct depth. In April 2010, AET Ltd and ZVB Ltd met. Patches were cut out of three joints. The sealant depth in two joints was satisfactory; however, the sealant in the third joint was found not to be deep enough. AET Ltd remedied the problem by putting more sealant over the existing sealant.

[4] AET Ltd claims the outstanding sum of $4,224.69 plus $1,249.07 in interest and costs.

[5] After some discussion, the parties agreed that the sealing depth should be half as deep as the width of a joint with a specified minimum depth.

Issues

[6] The issues to determine are:

(i) Is the Construction Contracts Act 2003 (CCA) relevant to this dispute?

(ii) Did AET Ltd apply sealant to the correct depth in the joints?

(iii) Is AET Ltd entitled to costs and interest?

Decision

Is the Construction Contracts Act 2003 (CCA) relevant to this dispute?

[7] As the Construction Contracts Act 2003 covers construction disputes, this contract is no doubt one that the CCA would generally cover. However, because there is no evidence that the parties intended payment to be subject to the procedures outlined in s 20 of the CCA, the CCA has no particular relevance to this claim.

Did AET Ltd apply sealant to the correct depth?

[8] As the parties agreed it was the case, implied into the contract is a term that the sealant should have been applied to a depth half the width of the joint, but no less than ten millimetres deep. Therefore, if the sealant was not applied in accordance with this term, the contract will be found to have been breached.

[9] As one joint was found not to have sealing applied to the correct depth, I find AET Ltd breached the contract to this extent. The joint has since been fixed.

[10] JS says that he believes the sealant was not applied to the correct depth to other parts of the building. He believes that the onus is on AET Ltd to show it applied the sealant properly. However, I do not consider this to be the case. While the overall onus lies with AET Ltd to prove its claim, this assertion is ZVB Ltd's defence to the claim. If ZVB Ltd wishes to succeed in its defence, it must provide the evidence to prove its defence. As JS provided no other evidence to show any other joints in the building were similarly affected, the necessary evidence was not forthcoming.

[11] JS says that, as AET Ltd's claim form stated, it carried out the work properly, AET Ltd should be obliged to prove this was the case. However, it is clear from the discussion today that AET Ltd is not raising the quality of its work as an issue; rather, the statement was made in response to ZVB Ltd's defence. This does not shift the onus away from ZVB Ltd to prove its defence.

[12] JS said it could cost in excess of $20,000.00 to remedy the work as the sealant must be removed and replaced. However, JS has provided no evidence that the work does in fact require a remedy. In any event, even if ZVB Ltd were to prove AET Ltd did not apply sealant to the correct depth in other parts of the building, the existing sealant may not need to be removed. When AET Ltd remedied the one joint found to be defective, it applied more sealant over the existing sealant. JS raised no objection to the remedy. Overlaying existing sealant with new is likely to cost considerably less than removing and replacing the sealant.

[13] Lastly, AET Ltd's invoice should have been paid as it fell due. This is because the parties had not agreed on progress payments and there is no evidence the parties agreed that any portion of the money owing could be retained. Until the parties discovered the problem with one joint, the only reason ZVB Ltd withheld payment was because it suited ZVB Ltd not to pay earlier. A party's convenience is not a good reason to withhold payment.

Is AET Ltd entitled to costs and interest?

[14] The Tribunal cannot award costs except in special circumstances, as set out under s 43 of the Disputes Tribunals Act 1988 (DTA), or unless the parties agree at the outset that costs can be recovered in the event of a default.

[15] I do not award costs. The circumstances outlined in s 43 do not apply here. Further, I have insufficient evidence that shows me the parties entered the contract on the basis that collection costs would be payable in the event of a default. An invoice raised after the contract had been formed containing such a statement is not evidence the parties agreed to such a term at the outset. This is unless such a term can be implied from the trading history. However, without evidence of the parties' trading history and the terms on which they traded, I have no basis on which to imply such a term into the contract.

[16] The Tribunal has the discretion to award interest: see s 20 of the DTA. In this instance, I exercise my discretion to not award interest. MG thought the $1,49.07 claimed might be for interest and costs, but was not sure because AET Ltd's debt collection company prepared the claim. Without knowing the precise details, I make no award.