

BETWEEN

AGD Ltd

APPLICANT

AND

ZVT Ltd

RESPONDENT

AND

ZVS

SECOND RESPONDENT

Date of Order:

23 January 2014

Referee:

Referee Smallholme

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZVT Ltd is to pay AGD Ltd the sum of \$1,462.45 with payment to be made by 5 pm on Thursday 6 February 2014.

Facts

[1] In March 2011, AGD Ltd provided refrigeration advice and services to ZVT Ltd. The work involved resolving problems with the freezer room and chiller room installed at ZVT Ltd's premises by a third party contractor. The work was done on a "charge-up" basis.

[2] Mr QI, the director of AGD Ltd, and ZVS, the director of ZVT Ltd, agreed that after AGD Ltd had completed commissioning the freezer, it became apparent the new, smaller evaporator installed by AGD Ltd was not of a sufficient size to cope with the volume of work required of it.

[3] Mr QI advised ZVS to re-commission the original evaporator. Mr QI and ZVS agreed that Mr QI gave an undertaking to not charge for the work in decommissioning the new evaporator and recommissioning the original evaporator. Mr QI completed this work. He retained the new evaporator. The freezer room has operated successfully since the evaporator was replaced.

[4] When it came time for payment of AGD Ltd's account, ZVT Ltd withheld \$3,000.00 of the total amount charged of \$9,921.72. ZVS stated this was to reflect the cost of the new, smaller evaporator retained by AGD Ltd.

[5] AGD Ltd claims \$4,217.50 from ZVT Ltd, being \$3,000.00 unpaid on the account and \$1,217.50 for collection costs.

Issues

[6] The issues are:

- (i) Whether AGD Ltd's charges should be reduced for the cost of the evaporator and any associated installation costs; and

- (ii) Whether there is any basis for ZVT Ltd to pay collection costs.

Decision

Should AGD Ltd's charges be reduced for the cost of the evaporator and any associated installation costs?

[7] The evidence for AGD Ltd from its supplier's stock book, established that the cost of the new, smaller evaporator was \$1,337.00 plus GST of \$200.55 - totalling \$1,537.55. AGD Ltd had charged ZVT Ltd for this evaporator despite the fact it was not installed in the freezer and remained the property of AGD Ltd.

[8] It is a basic term of any contract that a party can only be paid for goods and services supplied. As AGD Ltd ultimately failed to supply the evaporator, and retained ownership and possession of it, AGD Ltd is not entitled to payment for the evaporator. Therefore, the amount of \$1,537.55 should be deducted from the amount of \$3,000.00 due from ZVT Ltd to AGD Ltd.

[9] ZVS queried whether the final price charged by AGD Ltd included the labour for decommissioning the small evaporator and re-commissioning the original evaporator. This is possible, however, I consider on the balance of probabilities, Mr QI did not charge for his time in doing that work or for any materials used to replace the small evaporator. In making this finding, I have regard to:

- (i) The fact that both Mr QI and ZVS agree that Mr QI undertook not to charge for that work, prior to completing the work.
- (ii) That Mr QI is a credible witness. He gave specific details of what the decommissioning work involved. He stated that while doing the work, he was conscious that he would not be charging for it as he felt "a bit responsible" for a "misunderstanding" about the likely load for the evaporator.

- (iii) That there is no other evidence to suggest that the amount charged by AGD Ltd was excessive for the work completed. In having regard to the amount of time since the work was done, neither party appear to be in any position to provide evidence to the contrary.
- (iv) The charges may have included some further materials such as pipe work. However, the photographs have established that the quality of the work completed by the original contractor was poor. This includes the damage to the pipe work and therefore, shows there was already a need to replace most, if not all, of the pipe work.

Is there any basis for ZVT Ltd to pay collection costs?

[10] Claims for costs could either be successful under s 43 of the Disputes Tribunals Act 1988 or in contract by way of offer and acceptance of the terms and conditions.

[11] The requirements of s 43 of the Act are not made out: The claim was not frivolous or vexatious; the claim was properly filed in the Disputes Tribunal; and neither party had unnecessarily prolonged the proceedings.

[12] As to any claim in contract, Mr QI believed he had emailed a copy of AGD Ltd's terms and conditions to ZVT Ltd. However, ZVS stated he had not received them and there is no evidence of the email being sent. Further, the terms and conditions were emailed after the work had commenced and there was no acceptance of them by ZVT Ltd. Accordingly, there is no basis in contract for AGD Ltd to charge collection costs. The claim for collection costs is dismissed.

[13] Therefore, ZVT Ltd is liable to pay AGD Ltd the sum of \$1,462.05, this being \$3,000.00 unpaid by ZVT Ltd minus \$1,537.55 for the cost of the evaporator.