

BETWEEN

AM LTD
APPLICANT

AND

ZN
FIRST RESPONDENT

AND

ZNZ
SECOND RESPONDENT

Date of Order:

30 May 2014

Referee:

Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that AM Ltd is to pay the sum of \$8,212.15 directly to ZN and ZNZ on or before 21 June 2014; and the applicant's claim is dismissed.

Facts

[1] ZN and ZNZ engaged AM Ltd ('AM Ltd') to prepare a preliminary design for a new house for their family. A written contract was signed on 5 September 2013 and a detailed design brief completed by the respondents by 10 September 2013 (it was agreed that this formed part of the contract).

[2] The contract provided that up to 100 hours of design work would be performed by AA [for AM Ltd] at the rate of \$100 per hour plus GST and disbursements. The deliverables for this phase were to include three floor plans and one scale model at 1:100.

[3] Three floor plans were produced but were not accepted by ZN and ZNZ as meeting the design brief, particularly in terms of access to the lower part of the section. Five further floor plans were produced and because of the extra time spent on additional plans AA initially declined to provide a scale model, but eventually did so.

[4] In November 2013 (after approximately six of the eight floor plans had been completed) AA invoiced \$7665.90 which ZN and ZNZ paid. This included \$6650+GST of hours and the balance for disbursements. The disbursements on the second and final invoice have been paid and it is the balance of hours, being \$3350+GST (\$3852.50) that AM Ltd claims for (plus interest and costs).

[5] The dispute arises because ZN and ZNZ contend that none of the floor plans met the brief in terms of budget and that the service has therefore not met the statutory guarantees provided for in the Consumer Guarantees Act 1993. They claim a refund of the money already paid of \$8212.15 plus costs.

[6] The budget available to ZN and ZNZ for their new home was not written into the contract documents. They say they told AA that the total budget for the project was \$450,000.00 at one of their early meetings, before they engaged him, and that because he wrote the figure onto one of the plans, they considered they did not need to include it again in the contract.

[7] AA maintains that the figure of \$450,000.00 written on the plan was what ZN and ZNZ told him they expected their existing house to sell for. He contends there was never a figure given to him as a budget for the project.

[8] Because the claim is for work done and invoiced, the issues below are framed in terms of what is disputed by ZN and ZNZ.

Issues

[9] The issues to determine are:

- Did ZN and ZNZ communicate to AA that their total budget for the project was \$450,000 and if so, did this form part of the contractual terms?
- Did AM Ltd provide the service with reasonable care and skill and was the service fit for the purpose for which it was provided, specifically:
- Can any of the designs provided be built within a \$450,000 budget?
- What remedies, if any, are available to ZN and ZNZ?
- What sum is due on the claim and counter-claim?

Did ZN and ZNZ communicate to AA that their total budget for the project was \$450,000 and if so, did this form part of the contractual terms?

[10] I find that it is more likely than not that the \$450,000 figure communicated by ZN and ZNZ to AA was the couple's total project budget. AA is adamant that they told him this was the price they expected to receive from selling their existing property. If that were the case, the figure would be meaningless unless AA also knew either how much they still owed on the property and/or how much more they planned to borrow. It makes little sense to note down a figure on a plan unless it has some relevance or meaning and all the parties agree that it was AA who wrote the figure on the site plan at one of the first meetings before AM Ltd was engaged.

[11] ZN and ZNZ also provided evidence to show that AA's total estimate for hours on the full design process, detailed in an email dated 5 September 2013 (the same day the contract was signed) was 451 hours (at \$100 per hour), and based on his earlier advice by email in August that total architect fees are generally around 12% of construction costs, this equates to a total project budget of \$420,933.33 + GST (\$480,073.33), which is more or less

consistent with the budget they maintain they had communicated to him. They understood from these communications that AA had their budget in mind.

[12] Given the dispute that has arisen, it would have been useful for all parties if the project budget had been documented in the written contract. However, I accept based on the reasons above that it had been communicated prior to the formation of the contract and that it was an essential term of the contract.

[13] Even if the budget had not been communicated to AA, BB, a witness who acts as an adviser to the New Zealand Institute of Architects, and who ZN and ZNZ were put in touch with via NZIA, stated at the hearing that one of an architect's first obligations to his client, as early as the preliminary design stage, is to clarify the client's budget, timeframe and scope of works. BB put forward the view that this is "absolutely fundamental" and I agree.

[14] AA's argument that he did not know the budget is therefore not an argument that goes in his favour, unless he could demonstrate that he was specifically instructed that "the budget is unlimited" and this was clearly not the case.

Can any of the designs provided be built within a \$450,000 budget?

[15] Both parties have presented copious evidence on this issue. Given that the contract was for preliminary design only, I recognise that all costings taken off preliminary floor plans must, of necessity, be based on a large number of assumptions about construction method and materials, and are therefore likely to vary widely. This is indeed the case. Given that the only design that ZN and ZNZ accepted as meeting the design brief in all aspects except budget was for floor plan '[document one]', I have mainly considered the costings relating to that plan.

[16] AM Ltd has presented costings carried out by a builder AA has worked with over a long period, CC of ABC Ltd. His cost for [document one] was \$421,300+GST or \$484,495.00. This does not include architect's fees (of approximately \$45,000+GST) or building/resource consent fees and significantly, is based on the assumption that ZN would both act as project manager and be working full-time on the build as a labourer. ZN denies that he ever suggested he would be available to work on the project full-time. ZN and ZNZ's witness, DD, an architect, appeared at the hearing and among other evidence as to estimated costs, estimated a reasonable labour cost for ZN's unskilled labour for a project of this size/length would be in the vicinity of \$56,000 + GST.

[17] Given that there is no agreement that ZN was to work on the build himself, the cost estimates provided by AM Ltd's own witness (once provision for additional labour, fees and consents is made) significantly exceed the total project budget of \$450,000.00. I have therefore not addressed in great detail the cost estimates provided by ZN and ZNZ. I will simply note that they range from \$713,000 to \$759,000 excluding all council, consultant and architect fees.

[18] AA contends that one of the earlier designs, [document two] met all aspects of the design brief and I note this is the cheapest of the designs that his witness, CC priced, at \$265,000+GST, even though it has the greatest floor area. ZN and ZNZ rejected this design on the basis that they did not want their vehicle access to the lower section on the northern side of the property because of the slope and pohutukawa trees located there. However, even if it could be demonstrated that the access was a reasonable option, CC's pricing needs to be adjusted for additional labour, council fees and architect fees, as detailed above. Such an adjustment brings the estimated cost for [document two] into the vicinity of \$420,900 incl GST without Council or consultant fees (which are unknown).

[19] I note that ZN and ZNZ's witness, DD, challenged ABC Ltd's figures on the basis that they did not give adequate breakdown in each category and made insufficient allowances in many areas. He provided detailed written analysis and queried many aspects of ABC Ltd's estimates, which I accept were insufficiently detailed to provide a reliable estimate, even given the constraints of pricing off preliminary floor plans. I conclude that, given the vast difference between ABC Ltd's and ZN/ZNZ's three estimated prices for [document one], the close proximity of ABC Ltd's [document two] estimate to the total budget even without Council and consultant fees, and its insufficient breakdown, I cannot rely on ABC Ltd's estimate for [document two] even if it could be shown that other aspects of the design brief had been met by this design. AM Ltd has therefore failed to prove that any of its designs could be built for the budget of \$450,000.00.

Law

Was the service provided by AM Ltd provided with reasonable care and skill as per the guarantee in the Consumer Guarantees Act 1993 and is the service fit for the purpose for which it was provided?

[20] I find that the service was not provided with reasonable care and skill. This is not a comment on AA's design skills as an architect - rather the problem with the service was related to the process of determining and working to the client's total budget. Even if I had

found that ZN and ZNZ had not communicated their project budget, AA had a duty to clarify at least a ballpark figure with them before proceeding with even a preliminary design.

[21] Further, the outcome of the service is not fit for the purpose for which the purpose was provided, which was to arrive at a design which could be developed further and ultimately a house built from that design that met all aspects of the design brief. I have found that none of the designs could be built within the total project budget of \$450,000 which was an essential element of the brief.

What remedies, if any, are available to ZN and ZNZ?

[22] Section 32(b) of the Consumer Guarantees Act 1993 provides that, where a failure cannot be remedied, the consumer may obtain damages in compensation for any reduction in value of the product below the charge paid or payable by the consumer for the service. The process in this case went so awry and the relationship between the parties has deteriorated to such an extent that the failure cannot now be remedied.

Decision

[23] ZN and ZNZ say that they have received no value from the preliminary design process they went through with AM Ltd because they are not able to use any of the designs arrived at. I accept that they cannot use the designs and therefore the reduction in value of the product is the price paid/due in its entirety. Whatever small benefit they may have gained from the process, such as finding out what they can and can't achieve for their budget, has been more than outweighed by the delay and costs involved in having to start the design process from scratch. I therefore award the full refund they claim and dismiss AM Ltd's claim for the balance of the invoiced amount.

[24] Neither party is awarded costs because section 43 of the Disputes Tribunals Act prohibits the award of costs associated with preparing for and attending hearings.