

**IN THE DISPUTES TRIBUNAL**

**[2014] NZDT 672**

**BETWEEN**

**AW LIMITED  
APPLICANT**

**AND**

**ZD LIMITED  
RESPONDENT**

Date of Order:

9 June 2014

Referee:

Referee Luke

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that AW Limited is to pay ZD Limited \$966.00 by Monday 23 June 2014. The claim by AW Limited is dismissed.**

### **Facts**

[1] This claim started with AW Limited suing ZD Limited for \$3,588.00 on an unpaid invoice for website development work the company says it did in October and November of 2013.

[2] ZD Limited responded to the claim saying the work undertaken by AW Limited to complete development of its website was never completed within the agreed deadlines and was cancelled. It has counterclaimed for the return of the deposit it paid on the work of \$966.00. AW Limited then expanded its claim to include interest and its costs in attending the Tribunal.

### **Law**

[3] The claim and counterclaim are governed by the law of contract. A contract is comprised of an exchange of obligations. Where an obligation is breached by one party the other party may sue for damages resulting from the breach. Section 7(4) of the Contractual Remedies Act 1979 also provides that where the breach is substantial, the innocent party may cancel the contract and sue for damages. The issue in this dispute was whether AW Limited breached its contract with ZD Limited in terms of the timeliness with which it provided its services.

### **Issues**

[4] Did the contract include a deadline by which the work needed to be completed?

[5] Did AW Limited breach the implied deadline and therefore breach the contract?

[6] What damages, if any, is ZD Limited entitled to?

### **Decision**

*Did the contract include a deadline by which the work needed to be completed?*

[7] Both parties agree the contract was formed at a meeting on Monday 21 October 2013. They agree the job was urgent. ZD Limited was approaching the two months of the

year when it did almost all of its business and it had no website. It had been working on a website with an Indian web company but had run into an issue with processing address information for online orders that appeared to be unassailable.

[8] AA from AW Limited told me that it was made clear to BB from ZD Limited that there could be no guarantee as to how long the site would take to finish or how much it would cost. Inheriting the work of another company is a potential mine field because there can be many hidden problems that may arise.

[9] BB denies he was told AW Limited could not guarantee the time it would take to do the work at the meeting. He says the company was very positive about its ability to do the job and in fact suggested Thursday 24 October, only three days later, as a timeframe to shoot for. BB points to the emails he was sent following the meeting: one on the same afternoon from CC (a client manager for the company) saying *“we are sure we can assist you and ensure that we get this website up and running as soon as possible.”*; and another the following day from AA with a run down on the time needed *“Address Issue – around 6hrs (a lot more complicated than expected. Will need to discuss further)”*. He says none of the emails suggested or stated that no assurance at all could be given about the time it might take to do the work.

[10] In the way that AA addressed this dispute both in the hearing and with BB when it arose, I gained the impression that she felt her company could not be held to any deadline once it had been made clear at the meeting that a timeframe could not be guaranteed. I do not agree.

[11] I do not accept that it was expressly agreed that the company could take as long as it liked to do the work. I accept that some representation was likely made at the meeting that AW Limited could not say with certainty how long the work would take, but this representation does not exist in isolation. There is also the acceptance that time is of the essence, the suggestion by AW Limited that it aim to have the work done by the Thursday, that 6 hours was the estimated time allocation, and that this estimate came after 6 hours was spent “researching” what would need to be done.

[12] Where the parties have not expressly agreed on a time element in a contract, the law will frequently imply a reasonable one taking into account the circumstances and the discussions between the parties. I find that it is implied in the discussions over this project that:

- a. Time was of the essence. (Both parties were aware of the urgency for ZD Limited and the impact that delay would have on the business. Time being of the essence means that any breach of the time provision is substantial and triggers the right to cancel); and
- b. That best efforts would be taken to complete the job by Thursday 24 October, but if it could not be completed by then, it would be completed shortly after and certainly within the week following, i.e. by Friday 1 November.

*Did AW Limited breach the implied deadline and therefore breach the contract?*

[13] The work was not completed by Thursday 24 October. I find in fact that the contract was breached almost immediately because AW Limited did not begin the work until the 24th. I found above that the company agreed to make its best effort to finish by the 24th. It didn't begin the work until the 24th. On Wednesday 23 October AA wrote to BB "*DD is looking to set up a dev site and make a start on your project tomorrow*", which is what he did. The company suggested the 24th as the completion date and told BB that it could assure him it would get his website up as soon as possible. Delaying the start until the Thursday was a breach of the agreement. BB could have cancelled the contract based on this delay alone. As I pointed out above, time was of the essence and this delay was simply unacceptable given the assurances.

[14] Over the following week BB was told several times the work had been completed, and it was not. This happened in an email on 1 November. I find that AW Limited was in substantial breach of the completion date at this point and BB was again entitled to cancel the contract at this point. He did not. He allowed the company a further opportunity to complete, but from this point on, without getting an express agreement to extend the deadline (which AW Limited did not do), the company was "*on borrowed time*". BB might have cancelled at any point. What AA should have done at this point is discussed the issue with BB and found out from him if he would agree to an extension and what that extension would be.

[15] BB cancelled the contract by his email on 8 November 2014. He was entitled to do so as the company had been in breach of the deadline for a full week. I found it curious that AA then proceeded to ignore his cancellation and proceed as if he had not told her that the contract was over. This was unfortunately consistent with the poor management of the project and poor communication with BB throughout the job.

*What damages, if any, is ZD Limited entitled to?*

[16] The company has sued for the return of its deposit and says it is not liable for the balance of the invoice.

[17] The work AW Limited did up to the point of cancellation was of absolutely no value to ZD Limited. The company ended up having to create a whole new website solution. This was a foreseeable outcome if the work could not be completed on time. Arguably, it was also foreseeable that ZD Limited would lose sales. The company might have sued for the expense of creating an alternative website and for its lost profits, but the suit is merely to recover the deposit. I find that to be an eminently reasonable position.