(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2023] NZDT 239**

APPLICANT **B Ltd**

RESPONDENT **CT**

The Tribunal orders:

CT is to pay $1,226.71 to B Ltd before 6 July 2023.

Reasons

1. B Ltd (**B LTD**) provided concrete foundation services to CT (**CT**) between 7 November and 6 December 2022. It claims $3,368.70 from CT being the amount outstanding on its invoice INV-0177 dated 7 December 2022.

2. CT has paid for most of the work done by B LTD, however objects to paying this final $3,368.70 for the following reasons:

    a. He believes that he has been overcharged for the extra 16.6 cubic metres of concrete. He believes that he should be charged for this at $439.30 (GST inclusive) per cubic metre being the price he was quoted, rather than $594.55 (GST inclusive) per cubic metre charged by B LTD. $ 2,577.15

    b. Half of the cost of hire equipment from [redacted] to vacuum water and slurry from building foundation, which CT believes was only necessary because the dug out foundations filled up with rain-water due to concrete pour delays caused by B LTD $ 791.55

    $ 3,368.70

3. B LTD participated in today's hearing for just a few minutes at the beginning to advise that it was not going to attend, and that it wished the claim to be determined on the papers and the first hearing. It understands that this hearing is its opportunity to respond to CT's set-off defence, and that if it does not attend it loses this right. However B LTD advised that it did not wish to attend. It understands that the absence of a party does not prevent a hearing from going ahead.

4. The background to the claim is outlined in the adjournment order dated 21 March 2023. The issues to be resolved are:

a. Did the parties agree a price for the extra 13 m3 of concrete?
b. Did the parties agree a price for the extra 3.6 m3 of concrete?
c. If no price was agreed, what is a reasonable price for CT to pay?
d. Did B LTD carry out its services with reasonable care and skill?
e. If not, was it reasonably foreseeable that this would result in the cost of vacuuming water and slurry out of the foundation?

Did the parties agree a price for the extra 13 m3 of concrete?

5. The relevant law is the law of contract. When parties make promises to each other they must keep those promises. If they do not, they may have to compensate the other party to restore them to the position they would have been in had the promise been kept.

6. I find that the parties did agree a price for the extra 13 m3 of concrete. This is because the email trail between them clearly shows B LTD asking CT on 30 November 2022 to confirm that he accepted the additional concrete volume of 13 m3 at the advised price of $594.55, to which CT responded 'yes, confirmed'.

7. I have considered CT's belief that he should not be bound by his confirmation, as he felt that he had no option other than to agree as if he didn't it would delay the build of his home and disrupt other trades already booked.

8. However, as discussed during the hearing, for CT's agreement to be set aside would require that he had acted under duress or that B LTD was taking advantage of him by way of an unconscionable bargain. I have been unable to find that either of these was the case. This is for the following reasons:

    a. The legal doctrine of duress requires the illegitimate application of pressure. The law provides that a threat involving lawful conduct, in pursuit of a bona fide claim, (as is the case here) does not constitute duress. This is because to do so would introduce a substantial and undesirable element of uncertainty into the commercial bargaining process – so a party who disagrees with a commercial liability, but then agrees to an outcome cannot later retract it.

    b. I have also considered whether CT was subject to what the law calls economic duress. However this doctrine provides that if B LTD believed in good faith that it was entitled to its demand, and I find that it did because it had not previously provided a price for the 'extra' concrete, then CT cannot claim economic duress.

    c. There is no evidence that B LTD was taking advantage of CT. To the contrary it was suffering a financial hit by absorbing the increased cost of the first 25 m3 itself. While this may have been the result of its own action in delaying the pour by a week, it does not lend any support to B LTD having tried to take advantage of CT.

Did the parties agree a price for the extra 3.6 m3 of concrete?

9. The Consumer Guarantees Act 1993 (CGA) provides a guarantee in section 31 that where services are supplied to a consumer, and the parties have not agreed a price, the consumer is not liable to pay more than a reasonable price.

10. I find that the parties did not agree a price for the extra 3.6m of concrete. This is because there was no evidence presented that they had done so.

If no price was agreed, what is a reasonable price for CT to pay?

11. I have found that a price was agreed for extra 13 m3 of concrete. However I have found that no price was agreed for the additional 3.6 m3. Section 31 of the CGA provides that if no price was agreed then the consumers right of redress is to refuse to pay more than a reasonable price.

12. I find that a reasonable price for B LTD to charge for the additional 3.6 m3 of concrete is at $439.30 (GST inclusive) per m3. This is because this is the price that it would have been able to obtain the concrete at if the initial pour date had not been delayed, and I find in the paragraph 14 below that B LTD was responsible for the delay in the concrete pour.

Did B LTD carry out its services with reasonable care and skill?

13. Section 28 of the CGA provides consumers with a guarantee that services will be carried out with reasonable care and skill.

14. I find that the services provided by B LTD were not carried out with reasonable care and skill. This is because it had been agreed that B LTD would start the work on 31 October 2022, yet it did not start until 7 November 2022. This late start meant the pour was delayed by at least a week increasing the risk of weather events adversely impacting the dug-out site. I find that if a concrete contractor was providing its services with reasonable care it would not have done this.

If not, was it reasonably foreseeable that this would result in the cost of vacuuming water and slurry out of the foundation?

15. Section 32(c) of the CGA provides that if there has been a failure of a CGA guarantee, the consumer may obtain damages for any loss that was reasonably foreseeable.

16. I find that it was reasonably foreseeable that a lengthened time period between the dig-out and the concrete pour increased the chance of inclement weather resulting in costs. This occurred, with the heavy rain on 18 to 19 November 2022 filling the dig-out with rain. It is therefore appropriate that B LTD compensates CT for this increased risk and the cost incurred hiring equipment from Hydrovac to vacuum water and slurry from the building foundation. CT provided an invoice showing that this cost was $1,583.09. While he had initially claimed just 50% of this as a set-off defence, during the hearing he altered his set-off to be the full amount of this.

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17. I find that $1,583.09 is therefore a reasonably foreseeable loss suffered by CT.

Conclusion

18. For the above reasons, CT is to pay $1,226.71 to B LTD before 6 July 2023 calculated as follows:

a. Amount outstanding	$ 3,368.70
b. Less difference between $594.55 & $439.30 for 3.6m3	- $ 558.90
c. Less cost of water vacuum equipment	- $ 1,583.09
	$ 1,226.71

Referee: L Thompson
Date: 6 June 2023