



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

District Court

[2023] NZDT 82

**APPLICANT**      **BJ**

**FIRST  
RESPONDENT**      **T Ltd**

**SECOND  
RESPONDENT**      **K Ltd**

**THIRD  
RESPONDENT**      **BD**

**The Tribunal orders:**

The claim is struck out against BD; and

The claim is dismissed against T Ltd and K Ltd.

Reasons

1. BD was struck out from these proceedings at the outset of the hearing as the Disputes Tribunal has no jurisdiction to hear claims against a Local Authority acting in its statutory capacity with regards to building consents/inspections etc.
2. In November 2021, BJ purchased a newly constructed unit from T Ltd. At the pre-settlement inspection BJ raised issues with the cladding, specifically the fixings used on the cladding which he says were not flush, and which were, in some places, leaching a rust-like colour. The cladding is B Panels which are manufactured and supplied by K Ltd.
3. A certificate of compliance was obtained for the building and settlement proceeded on 5 April 2022. Post-settlement a site meeting was held at which T Ltd acknowledged, and subsequently carried out, some remedial work on the cladding.
4. BJ claims \$30,000.00 compensation based on his contention that the fixing method is a building defect under the Building Act 2004 because it does not adhere to K Ltd's technical specifications, and/or that he has been misled by K Ltd's product presentation because the final look of installed panels does not correspond to what is advertised.
5. Although BJ mentions the Consumer Guarantees Act 1993, that legislation does not apply to the unit he bought from T Ltd because the CGA excludes 'whole buildings'.
6. The issues to be determined are:
  - Does the method of fixing on the cladding breach the terms of the contract between BJ and T Ltd?
  - Is T Ltd liable to remedy the cladding as a defect under the Building Act 2004?

- Is K Ltd's product presentation and/or advertising misleading?
- What damages and/or other remedy is available to BJ?

*Does the method of fixing on the cladding breach the terms of the contract between BJ and T Ltd?*

7. I find that there has been no breach of contract because there is no method of fixing specified in the contract. The material specifications that form part of the contract between BJ and T Ltd state that the cladding is to be B Panels but no representation was made by T Ltd as to the visual appearance of the cladding for this particular development. BJ researched the technical specifications for this K Ltd product himself and contends that the method of fixing for B Panels detailed in the K Ltd technical specifications is not the method used by T Ltd.
8. However K Ltd's representative at the hearing, technical manager, TL, stated that the technical specifications show fixing options, that there are more fixing methods are acceptable than just the one shown in the diagram, and that the diagram referred to by BJ shows a fibre cement nail that is a different shape to the gun nails used by T Ltd (which will not result in the same flush finish). TL added that the use of nail guns for fixing this cladding is a very common method used in the building industry and is an acceptable method of fixing their panels as far as K Ltd is concerned, although it does result in a less visually attractive outcome than the method shown in the technical specifications.
9. There is also no breach of any contractual term that could be implied, such as that products are to be installed in accordance with technical specifications because the product manufacturer in this case has approved the method of fixing used by T Ltd, explaining that the technical specifications contain options or examples rather than one mandatory method.

*Is T Ltd liable to remedy the cladding as a defect under the Building Act 2004?*

10. I find that the method of fixing the cladding employed by T Ltd is not a defect under the Building Act 2004, for the same reasons as above, that it is a method of fixing approved by the cladding manufacturer K Ltd, and it is a method that has achieved weathertightness and gained certificate of compliance for the building as a whole. BJ accepts that there is no weathertightness issue with the cladding and the defect he perceives is cosmetic only. Notwithstanding this, he is concerned that the visual impact of the cladding fixings will be detrimental to the value of his home.
11. The Building Act 2004 contains no specific definition of what constitutes 'defective building work' and I do not share T Ltd's view that there can be no defective building work if a certificate of compliance has been obtained, because there are some aspects of building work (such as the quality of interior painting, for example) that are not subject to building inspection for the purposes of a certificate of compliance. Those areas could nevertheless still be regarded as defective if they did not meet accepted industry standards.
12. However in this case, the fixing of cladding is an item that is subject to inspection by BD as it is a key component of weathertightness, and given that it has been approved as a method by the panel manufacturer, and passed inspection by BD, I cannot find that it constitutes defective building work by virtue of its appearance alone, even though it is much less visually attractive than other fixing methods.

*Is K Ltd's product presentation and/or advertising misleading?*

13. BJ points to photos of B Panels installed on a building that feature on K Ltd's website and notes that he visited a K Ltd Show Home specifically to look at the B Panel cladding prior to entering into the contract to buy a unit from T Ltd. He has provided evidence to show that in both these instances, the fixings are visually unobtrusive and do not bear any resemblance to the visual

appearance of the cladding on his unit. He claims K Ltd's product presentation is misleading because the final product on his unit does not correspond to what they advertise.

14. However, using installation methods or treatments that show off one's product to its best effect in advertising or marketing material is not misleading or deceptive conduct (unless that 'best effect' could never actually be achieved) and would therefore not be a breach of the Fair Trading Act 1986. Rather, it is expected and not unusual that suppliers will 'put their best foot forward' in marketing. K Ltd's evidence is that visually unobtrusive fixing methods (such as those presumably used in their marketing material) are only one acceptable fixing method and that the method used by T Ltd is common and acceptable industry practice. K Ltd did not determine or decide the fixing method to be used by T Ltd (though has confirmed it is an approved method) and was not a party to the contract for the sale of the unit.

*What damages and/or other remedy is available to BJ?*

15. For all the reasons outlined above, no damages or other remedy is available to BJ and the claim is dismissed.

**Referee Perfect**  
**Date: 23 February 2023**



## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

### Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact. Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

### Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

### Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.