



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIC LtdNAL

District Court

[2023] NZDT 202

APPLICANT C Ltd

RESPONDENT TI

The Tribunal orders, on the claim and counter-claim:

C Ltd is to pay \$4509.73 to TI on or before 25 May 2023; and

The claim is dismissed and the balance of the counter-claim is dismissed.

Reasons

1. TI engaged C Ltd to supply fabric and other materials, and to re-upholster a large couch, bay window seat squabs and re-cover scatter cushions. There was some back-and-forth email correspondence about what upholstery fabric was preferred and/or available, and eventually a large-check gingham fabric was ordered by C Ltd and an invoice for the fabric cost, as part-payment, sent to TI.
2. TI paid the \$4509.73 initially invoiced and the work was carried out by C Ltd.
3. When TI received the furniture back, she was dismayed to discover that it had been covered in large-check fabric whereas she had wanted a small-check gingham. She raised the issue with C Ltd and declined to pay the \$5054.25 invoiced for the balance of the job. That amount is claimed by C Ltd.
4. TI declined C Ltd's offer to recover the items at no cost if she paid for the new fabric (which was based on C Ltd's position that she had agreed to the large-check ordered). TI claims that there are other quality issues with the job, such that she says she cannot use the couch and now has it stored, waiting for the outcome of this hearing. She claims \$30,000.00, being a refund of \$4509.73 already paid to C Ltd, and the balance to purchase a replacement couch, redo the squab cushions and replace scatter cushion inners.
5. The issues to be determined are:
 - What order for fabric had been placed by TI? By paying the amount on the first invoice, did she accept the fabric noted on the invoice?
 - Was the upholstery work carried out with reasonable care and skill by C Ltd and were the resulting products of the service fit for purpose?
 - Is the outstanding balance for the job due to C Ltd and what remedy, if any, is available to TI?

What order for fabric had been placed by TI? By paying the amount on the first invoice, did she accept the fabric noted on the invoice?

6. I find that TI made clear in her email communication to C Ltd that she wished to place an order for small-check fabric for the job. The email evidence shows that on 7 March 2022 C Ltd confirmed that they had ordered 26 metres of Suffolk Check Small Peony. Over the next few days the meterage was increased to 32 metres to include all the cushions, and TI gave the go ahead. Then, on 10 March, C Ltd advised that the preferred fabric had been discontinued and that they were trying to source an alternative.
7. After more back and forth emails, C Ltd advised that “both Romo Elmer fabric colour ways are available from [overseas]” (a small check fabric) – the conversation was not picked up again by email until after a site visit in late May where HB from C Ltd was given a sample of TI’s (small check) fabric. He emailed on 3 June 2022 saying “I have seen the large check, and personally I prefer it... The small is discontinued”. TI replied on 3 June “Please try to see if there’s another brand in small check first: Elmer Red Tulip? Romo..” and C Ltd replied the same day stating the Elmer Red Tulip is available at a cost of \$135+GST per metre.
8. On 14 June, TI wrote “Hi [HB], Please can you see which one of these red checks is available in the SMALL CHECK please for my couch please and order. I am happy with the RED” (all TI’s large caps). She then named another possible fabric and attached pictures of the Elmer Red Tulip Romo fabric, a small check.
9. On 16 June, TI again requested that her fabric be ordered, and sent that email in direct response to the 3 June email from C Ltd confirming that Elmer Red Tulip was available at \$135+GST per metre (although a later email from C Ltd gives a cost for the same fabric as \$149.50+GST per metre).
10. When TI received the invoice dated 20 June 2022 for the fabric, she passed it to her husband for payment which was made, without noticing that the fabric stated on the invoice was “Suffolk Check Large – Peony”, also at \$135+GST per metre. TI points out that the invoice she received, back in early March when the Suffolk Check Small Peony was being ordered, also read “Suffolk – Large Gingham Check – Peony” even though HB confirmed the order was for Small Peony (which he then found out had been discontinued). TI was relying on the email communication and not the descriptions on various invoices that had been sent through.
11. While I accept HB’s view that there were a lot of different fabrics being discussed by email over a period of a few months, I can find no reasonable basis, from the written communication put forward, upon which C Ltd could have thought Large Peony (or any large check fabric) was wanted by TI. She was consistent in her wish for a small check fabric, the same as her existing fabric.
12. After review of all of the email evidence, I am of the view that the contract was formed and TI’s order was placed via the email communications and that it was not unreasonable given that she had communicated her wish that a small check fabric be ordered, that she simply paid the invoice when it arrived, after she had placed the order. I find that payment of the invoice was therefore not acceptance of the fabric stated on the invoice, rather that C Ltd made a mistake in the ordering of the fabric that TI unfortunately did not notice. If C Ltd had been unclear exactly which small check fabric TI had decided on, it needed to clarify with her, but as stated above, I can see no basis on which they could have understood she wished to order the large check fabric.
13. The remedy for this mistake will be addressed alongside any remedies for the further issues to be considered below.

Was the upholstery work carried out with reasonable care and skill by C Ltd and were the resulting products of the service fit for purpose?

14. In addition to the issue of the fabric, TI was unhappy with the quality of the upholstery job, saying that the cushions are now uneven and uncomfortable, the seams are wrong, the fabric is stretched, the pattern doesn't line up, a seat cushion is too wide for its base, the new foam in the window seat squabs is over-firm, and the feather cushion inners she supplied C Ltd to be re-covered were replaced with synthetic inners.
15. HB vehemently disputed all of these issues, bringing staff from his business as witness as to the quality of the work they performed. TI says she has consulted 4 different upholsterers, but most did not want to put anything in writing because it is a small industry. One of those upholsterers, OJ, was phoned from the hearing and stated that the couch foam "had been butchered with extra bits glued on" with the resultant "bulging" being visible. He stated that the fabric stretching and unevenness was "basically because of the foam". He said "the seat cushions were definitely not what they should be" and that C Ltd "should not just have added to the front". In terms of a ballpark cost to remediate, he said he would recommend getting it all stripped back to the frame, but did not give an estimated figure for what needed to be fixed.
16. OJ was the only independent witness we heard from, in spite of C Ltd having had the opportunity, during the adjournment period they requested, to have an independent inspection of their work undertaken. I consider that he has given sufficient detail of problems that I can conclude that the upholstering work was not carried out with reasonable care and skill in this case, and that the resulting product was not fit for purpose. However not all TI's points are proven – I find that the evidence provided about whether her scatter cushions had feather inners to start with or not is insufficient, and C Ltd strongly denies having swapped them out for foam-filled cushions. I also do not consider I have enough specific independent evidence about the foam in the squabs to determine whether there is objectively a problem with the foam used, or whether the outcome was simply quite different to what TI expected.

Is the outstanding balance for the job due to C Ltd and what remedy, if any, is available to TI?

17. C Ltd declined to provide TI a remedy when she requested one, because they did not accept they were at fault over the fabric order or that the quality of their upholstering work was not up-to-standard. Under the CGA, TI was required to give the supplier the opportunity to remedy any failures of guarantee and she did this.
18. Due to the contractual issue of the wrong fabric having been ordered, the appropriate remedy arising from that aspect of the dispute would be to have the furniture re-covered in the correct fabric at no cost to TI. That would obviously remedy a number of the other issues that TI was also unhappy with under the second heading. The question of remedy under the second heading therefore becomes, what would be the cost of fixing the issues with the foam on the couch and have any other additional costs been made necessary by the quality of C Ltd's work. While OJ stated stripping back to the frame would be required, I do not have any cost evidence for such work.
19. The remedy that TI has requested is the cost of purchasing a brand new couch and having it covered in her choice of fabric (as she has in fact done). This is not a remedy that can be considered because the necessary work could have been carried out to the existing couch – purchase of a brand new couch is not a reasonably foreseeable cost resulting from C Ltd's quality of work.
20. Due to the lack of specific cost evidence, and the combination of the contractual (fabric ordering) issue with CGA quality issues, I find that the most appropriate remedy is to 'undo' the contract as if it never occurred. I consider it unlikely that TI is left with any benefit from C Ltd's work because the description of what will be required to remedy appears to exceed what C Ltd did in the first

place, so it is likely that any potential value such as in the replacement of foam in the squabs will be offset by the additional labour required in fixing the couch upholstery issues. On the other hand there is simply no costings available so how much any additional costs for TI would be is unknown and unproven.

21. Undoing the contract means that TI is not liable to pay C Ltd the claimed balance of the invoiced work of \$5054.25 and C Ltd must refund the amount that TI has already paid of \$4509.73.

Referee Perfect
Date: 27 April 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>.