



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 346

APPLICANT D Ltd

RESPONDENT BE

The Tribunal orders:

BE is to pay \$12,466.50 to D Ltd on or before 18 August 2023.

Reasons

1. D Ltd was engaged by BE to undertake residential building work at his property in 2017. D Ltd's director, KX, says he first became involved with the project when he was asked by the [Builders' Association], of which he is a member, to assist with a dispute between BE and his previous builder. That dispute was apparently not able to be resolved and KX facilitated a new builder to take on the project, B Ltd. That contract also ended prematurely, and at that point, D Ltd was contracted to work on a charge-up basis.
2. Most of the contracted work was completed by D Ltd and paid for, but two final invoices were disputed by BE, one for a fence which had been contracted separately (via a fixed price quotation) to the main building contract, and one for time D Ltd spent liaising with sub-contractors who had worked on the project through-out, to gather the necessary compliance paper-work for Council in order to obtain a Code of Compliance certificate. Payment of a third invoice dated May 2018 is also claimed by D Ltd – BE says that he had not seen this invoice prior to the Tribunal proceedings.
3. BE was selling the property on completion of the building contract so D Ltd provided the necessary papers for Council sign-off to him, prior to receiving payment of all its invoices, so that the sale could proceed
4. D Ltd claims total outstanding invoiced amounts of \$17,066.27 plus interest at 15% accruing since April 2018. It was determined at the second hearing that the May 2018 invoice doubled up on an earlier disputed charge in error, so the adjusted balance of unpaid invoice amounts is \$13,525.85.
5. The issues to be determined are:
 - Is BE liable to pay \$3070.50 for time spent on CCC-related issues by KX of D Ltd?
 - Did D Ltd supply the cedar that was used to build the fence on which their invoice balance of \$4761.48 is based?
 - Is the invoice dated May 2018 (Invoice 1101) valid if it was not sent to BE at that time, and if so, what charges on it are proven as payable by BE?
 - Is BE liable to pay 15% contractual interest as claimed by D Ltd on any payable outstanding balances?

Is BE liable to pay \$3070.50 for time spent on CCC-related issues by KX of D Ltd?

6. BE contends that he did not give KX instructions or permission to carry out work liaising with earlier sub-contractors or with Council for the purpose of gathering and submitting the required paperwork to gain Certificate of Compliance for the build.
7. KX says BE was well aware that he was dealing with these issues – as an example, he says that on at least one occasion he accompanied BE's wife to a meeting with Council. KX has provided details of the approximately 34 hours of his time charged and argues that it was work that was necessary in order for CCC to be issued by Council (and therefore for the house to be sold). KX says it was also work requested by BE, but I find that even if it wasn't, it was work that was reasonably part of D Ltd's charge-up contract to complete the project and was certainly work that was of benefit to BE. I therefore find that BE is liable to pay the invoiced amount of \$3070.50.

Did D Ltd supply the cedar that was used to build the fence on which their invoice balance of \$4761.48 is based?

8. BE says he supplied the cedar that was used to build the fence and even though he acknowledges that D Ltd ordered cedar for the fence and that it was delivered to site, he says he personally saw a truck come and take it away again, so he believed that D Ltd returned it to the supplier.
9. KX disputes BE's version of events and has provided the invoice from its timber supplier to prove the materials charged for were ordered. KX says the cedar D Ltd ordered was not returned to the supplier at any point. D Ltd also pointed out that BE agreed to a fixed price for the fence which included materials and labour and they have invoiced based on that agreement. KX notes that when the fence timber was changed from pine to cedar, D Ltd left the contract price unchanged even though cedar is a more expensive timber than pine.
10. KX acknowledges there was discussion about whether D Ltd could use any of BE's cedar that was left over from the house cladding for the fence, but says that he was present on site when BE and D Ltd's worker carried the left-over cladding around to measure it. KX says a lot of it was split and a lot was off-cuts which would not have been suitable for fencing boards.
11. BE has provided photographs of the cedar that he says demonstrate that he initially tried to sell it on Trade Me (before the fence contract was entered into) and then tried to sell a reduced amount at a later date (after the fence was built). However the photographs are insufficient to prove his contention because it cannot be verified that all available cedar was being photographed on the respective dates.
12. I consider it is possible that a small amount of BE's cedar was used for the fence, which might explain why the price charged by D Ltd remained the same as the originally quote price for a pine fence even though the timber was changed to the more expensive cedar option.
13. As there was a fixed price contract agreed for the fence, the onus lies with BE, if he seeks to rely on some purported variation to that contract, to show that a different agreement was reached as to use of materials and/or price. No such agreement was documented and I find on the balance of probabilities that D Ltd did supply the cedar as invoiced for the fence.

Is the invoice dated May 2018 (Invoice 1101) valid if it was not sent to BE at that time, and if so, what charges on it are proven as payable by BE?

14. BE says he did not receive invoice 1101 at or near the time it is dated (May 2018). However this does not invalidate its contents if the charges invoiced are established as actual and reasonable for the work done by D Ltd.

15. D Ltd says the invoice represents a 'wash-up' of all charges for the project, and includes labour charges from November and December 2017. D Ltd has provided its workers' timesheets for the relevant dates/hours and these match what has been invoiced. I note that most of the charge-up labour had been invoiced in a final invoice to BE at the end of October, and I accept that that accounts for why finishing-up work done in November and December was first charged in a 'wash-up' invoice in May 2018.
16. With respect to the rest of the charges on Invoice 1101, D Ltd has been unable to support 3 of the itemised amounts with supplier invoices because of the time that has passed. One of the itemised amounts was the cedar charge which has been doubled-up in error in D Ltd's invoicing and the claimed total adjusted as a result.
17. I find that the remaining 7 itemised amounts are payable by BE because D Ltd has provided [supplier] invoices (all but one of which identify BE's site on the dockets). The total payable on the May 2018 invoice is \$4367.23 incl.GST.

Is BE liable to pay 15% contractual interest as claimed by D Ltd on any payable outstanding balances?

18. As per the above findings BE is liable to pay D Ltd a total of \$12,199.21 of the amounts invoiced.
19. While D Ltd claims contractual interest, they have provided no evidence of terms and conditions having been provided to BE or proven that BE agreed to interest on default amounts when the contract was formed.
20. Where there is no contractual rate of interest agreed, interest may be awarded by the Tribunal as per the Interest on Money Claims Act 2016. As discussed at the hearing, when a claim has been first brought some years after the cause of action arose, I consider it reasonable to limit interest to the period in which a claim could have been brought and resolved and deem that to be one year in this case.
21. As BE says he did not receive the May 2018 invoice until much later, and there is insufficient proof that he did, I restrict the award of interest to the first two invoice amounts awarded, a total of \$7831.98. Interest on that amount for a year from mid-April 2018 comes to \$267.29.
22. The total amount ordered as payable by BE to D Ltd is \$12,466.50.

Referee Perfect
Date: 21 July 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>.