



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 769

APPLICANT D Ltd

RESPONDENT H Ltd

The Tribunal orders:

H Ltd is to pay D Ltd \$9,660 by 18 January 2024.

Reasons

1. D Ltd developed two homes at [unit 1] (the front unit) and [unit 2] (the back unit) at [address].
2. The units were clad in Stria Hardie Board (Stria) with some Rockote and cedar. Stria is a product which has specifications for its installation and painting but comes pre-primed with a product already coated onto its surface. H Ltd was contracted by D Ltd to prepare and paint both units. H Ltd completed this work and was paid by D Ltd as follows:
 - a. Invoice 252 for \$9,660 which was paid on 29 September 2022 (this related to the front unit); and
 - b. Invoice 258 for \$8,500 which was paid on 22 November 2022 (this related to the back unit);
3. In around December that year an issue arose regarding the painted finish of the Stria with D Ltd unhappy with the finish developing issues in areas. In early March this year D Ltd obtained a report from [painting organisation] on the painting workmanship (the N report). As a result of that report H Ltd some remedial work, which appeared to be to the horizontal joints of the front unit only. D Ltd remained unhappy with the remedial work, as did the future purchasers of the units. A further report from SI dated 21 March 2023 (the SI report) appears to have been commissioned by those purchasers of both units and issued after the remedial work. The SI report focused on comparing the 'as-built' Stria installation with technical instructions and specifications and plans and providing an opinion on required remedial repairs which were needed for a variety of issues, some of which only related to H Ltd's workmanship. I understand as a result of this report the front unit only has been reclad.
4. A direct approach by D Ltd to H Ltd for compensation did not resolve the matter and D Ltd claims a full refund of the amounts it paid H Ltd for the two invoices set out above, which total \$18,160.80.

5. The hearing was by teleconference. Z and T represented D Ltd and H represented H Ltd. H Ltd's insurer withdrew from the claim prior to hearing on the basis it did not provide cover on the information it had seen.
6. In considering the evidence and information the parties have provided, I need to decide:
 - a. Whether H Ltd is in breach of an obligation regarding the painting to D Ltd;
 - b. If so, what loss that has caused D Ltd.

Was H Ltd in breach of an obligation regarding the painting to D Ltd? If so, what loss has that caused D Ltd?

7. H Ltd did not dispute it had an obligation to paint in accordance with specifications and in a good workmanlike manner, which would require reasonable care and skill.
8. For the preparation aspect of H Ltd's work, D Ltd has explained the preparation required filling of holes where the Stria had been fixed by the builder and the filling of horizontal joints in the Stria. D Ltd says:
 - i. The fill used was not correctly mixed for the holes and this left a rough finish and has fallen out in places; and
 - ii. The wrong filler was used in the horizontal joints.
9. As to H Ltd's painting, D Ltd has explained the painting was sub-standard in that it started to peel within three months of its application.

Preparation

10. The Stria specifications recommend flexible sealant and exterior grade two part filler.
11. I accept H's evidence he did not seal the horizontal joints as this was for the builder. I consider the Stria specifications support this being a task for the builder as the specifications note the sealant used must comply with the relevant requirements of the Building Code, and the drawings of the installation details for the cladding note where flexible sealer is to be used during installation, which supports this being a builder's, rather than a painter's obligation. The SI report also provides reference to the Stria specification for butt jointing of the Stria cladding and again this detail appears to require flexiseal but to be a building and installation detail rather than a painting detail. I say this because the figure from the specification accompanying that part of the SI report (Figure 17) shows how the cladding is to be butt jointed by the builder.
12. I also accept H's evidence he used a two part filler and I accept this is a filler recommended by the Stria specifications. I also accept that the reason the filler in the holes and on some joints has a white, rather than a pink, appearance is as H has in effect, 'topped' up the filler and sealant to provide a smoother finish. While H says this is usual practice, given the Stria specifications do not note this as a step or recommend this as a product I am not persuaded this aspect has been carried out to specification and so means a lack of reasonable care by H Ltd in not following the specification.
13. I accept the remedial work to the front unit by H Ltd was unsuccessful and the photographs do not suggest it produced an acceptable finish.
14. However in considering the effects of the 'topping up' the filler by H Ltd I consider the evidence only supports this as being an issue that required remediation for the front unit. It is clear on the

evidence that for this unit the builder used screws instead of nails. This of itself meant the Stria installation for the front unit was not to specification and any warranty on that product would be void. The SI report relevantly concluded:

“12.1 The only viable remedial repair option available to rectify the identified ‘as-built’ Stria installation defects...is to remove all the Stria panels and reclad in accordance with the technical instructions. This is because it is not possible to remove the incorrect screws and replace with the specified nails as the residual screw holes are ‘too big’ to cover and cannot be filled without being discernible. It is not considered acceptable to simply fill the removed screw holes and nail adjacent to the filled screw holes as the two sets of fixings will be evident and will mar the overall appearance of the Stria cladding. (footnotes omitted).

15. While D Ltd has suggested it was H Ltd’s workmanship which resulted in this building issue coming to light in the first place and causing the need for the front unit to be reclad, I consider it more likely the Stria on the front has been more flexible than if nailed and has increased visibility of the topped up filler as the panels have flexed and moved. This is supported by the SI report which noted delaminated shrinking and visible filler on horizontal joints (again with photographs from the front unit) but also noted for the front until tight butting of the horizontal joints has caused filler applied over those joints to fracture with panel movement.
16. I have considered the appropriate compensation, and after considering the undifferentiated repainting costs across both units, consider a refund of the amount paid to H Ltd for the front unit only, \$9,660, to be the fairest figure to compensate D Ltd in the circumstances and I award this. As I am not persuaded on the evidence there has been similar damage to the back unit from the topping up of the filler I do not award damages on that basis but consider that unit in terms of the issues of painting below.

Painting

17. I have not been persuaded by D Ltd that the painting to either unit was in breach of obligation by H Ltd. The N report noted a sulphur smell had apparently been detected during undercoating but I have not been able to find on the evidence the reason for this.
18. I accept H Ltd’s evidence the painting was in accordance with specification and this appears consistent with the evidence of the product sheets provided and the X report, which highlighted only a potential issue with filler or pre-priming adherence for the front unit. I do not accept X was not independent or there is an issue with the paint product used.
19. For the painting the N report described “small areas of delamination on some of the panels” (and referred to image 4 in the report) and “some areas where masking was removed and the paint has delaminated” (and referred to Image 5 in the report).
20. The SI report noted “small patches of the paint are ‘flaking off’, which is not expected for a newly painted cladding” and an area where paint had ‘pulled away’ after masking tape was removed and where paint was uneven at the top of the kitchen doors in the back unit. Photographs at 3.1 and 4.7 of that report accompanied those comments (I understand with the exception of photo 24 and 31 these all related to the front unit).
21. I consider the evidence of the delamination to be insufficient to persuade me the painting was not to specification or the required standard such as to require remediation by repainting the entire back unit. The photographs in the N report show very minor areas and, in light of credible

evidence these could represent damage onsite by third parties as construction was still continuing at the time of that report.

22. For this reason, I make no award for compensation for the back unit and except as ordered dismiss the claim.

Referee: J Costigan
Date: 16 December 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>.