



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 77

APPLICANT EB

RESPONDENT U Ltd

The Tribunal orders:

This order replaces the order determining this matter issued on 3 August 2022.

Claim: EB's claim for a declaration of non-liability is dismissed.

Counterclaim: EB is to pay U Ltd \$2,205.70 within 14 days.

Reasons

- [1] EB engaged U Ltd, represented by TU (director) and OU (office manager), to carry out building work at his house. The contract was for some \$50,000.00 worth of work. EB asks for a declaration from the Disputes Tribunal that he be not liable to pay an extra \$1,918.00 + GST, which U Ltd has invoiced him. U Ltd's counterclaim is for that sum and other costs, its contention being that the sum is owing as a variation to the contract relating to the building of a deck.
- [2] EB said that the deck had, at the time the contract with U Ltd was made, been planned as one that would consist of parallel planks. He said that the builder who had done the decking work, BZ, had said to him that the planking could be altered by using a system of breaker boards, whereby some boards were laid at right angles, thus obviating the need to butt boards in the method used when all boards were laid parallel to each other. EB said that he had agreed to this.
- [3] EB said that he had asked BZ about the cost of altering the layout of the boards, and BZ had replied that there would be some extra cost, but that he thought it would not be much more, and the breaker board method would be quicker than the laying of parallel boards.
- [4] After the work had been completed, said EB, he had been surprised to receive an invoice from U Ltd for a variation to the deck at a cost of \$1,918.00 + GST. EB said that he had telephoned TU to discuss the matter, but that TU had refused to converse with him. After that, the parties communicated by email about it. EB said that the quantity surveyor dealing with the work had not told him of any price increase associated with the alteration in the configuration of the decking; and he had not read the finely-printed schedules that had been attached to invoices that had been emailed to him by U Ltd as work had gone on.
- [5] TU and OU spoke for U Ltd. They said that the decking work had been completed in December 2021 and invoiced the following month. They said that they had attached a copy of the schedule of work to each of the three previous invoices that they had sent, which recorded the proposed alteration in the decking, and its price.
- [6] BZ appeared as a witness. He agreed that he had suggested that breaker board could be used as an alternative to the previously agreed system of parallel boards. He said that he had told EB that extra work, such as blocking and cutting, would be involved; it would create a nicer finish and would entail some extra cost. He had said that he had "not thought that there would be much in it"; the

cost would be “there or thereabouts”, or words to that effect. BZ was not authorised to deal with contractual matters and so did not give his opinion to EB as to what an extra cost might be, but said that in his, BZ’s mind, he had had a probable figure of about \$2,000.00. He had assumed that the quantity surveyor would convey, or had conveyed, the exact price to EB. BZ said that he had used all the boards that had been bought for the originally planned parallel system, and had had to buy three or four extra to complete the deck with breaker boarding.

The issue

[7] The question for me to decide is whether EB is liable to pay extra for the breaker board work. I accept that there was a variation to the original contract; the contract had initially contemplated parallel boards, but it was subsequently agreed that breaker boards would be used. The disputed point is whether EB must pay extra for the breaker boards.

The law

[8] As the contract was for more than \$30,000.00, it was required under the Building Act 2004 to be in writing. Neither party provided a copy of the contract to me. TU and OU said that there was no provision in it that required variations to be agreed in writing, and EB did not dispute that. I therefore must consider whether EB agreed, or should reasonably be taken to have agreed, to pay an extra price for the breaker board decking. I must look at this question objectively and consider whether a reasonable consumer would expect, in the circumstances, to pay an additional \$1,918.00 as a variation to the contract.

Decision

[9] There was considerable discussion in the hearing about what BZ had said to EB. BZ, of course, was the builder doing the work, and it was not his job to price work, or to deal with contract variations. If an alteration was to be made to the original contract specifications, information about any increase of price for that should have been given directly to EB from U Ltd itself, or from the quantity surveyor. I accept that no one from U Ltd spoke directly to EB about the increased price for breaker boards, and there was no evidence that the quantity surveyor did either. Therefore, as there was no express agreement to extra payment from EB, the question is whether it can reasonably be implied that EB knew that there would be a price increase for the altered decking. If so, he must be taken to have expected to pay a reasonable price for it.

[10] The only communication that has been established relating to a price increase for the variation is that of the work schedules that U Ltd attached to invoices that it sent to EB. I consider that these, which stated the proposed price for breaker board decking, can reasonably be regarded as notice to EB that the variation to the contract would come at the stated cost. In my view, U Ltd could reasonably have expected that EB would read the material that was attached to its invoices, and raise any objection that he might have to the prices for future work stated in them. He did not do so. I consider that a reasonable consumer in EB’s position, knowing that alterations to the contract had been made, would have perused the material sent to him about pricing, and responded according to what he had decided about it. In this case, EB did not look at the material that had been provided to him, but nevertheless allowed the breaker board work to go ahead.

[11] Thus, as I think that a reasonable consumer in EB’s circumstances should be regarded as having accepted the increased cost entailed by the agreed alteration to the decking, U Ltd’s claim for \$1,918.00 + GST is allowed.

[12] I have not allowed U Ltd’s claim for its solicitor’s fee and debt collection costs. EB made it clear within a reasonable time that he was disputing the variation cost, and there was no need for U Ltd to consult its solicitor or to incur the cost of debt collection.

Referee: C Hawes

Date: 21 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>.