



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 312

APPLICANT ED Ltd

RESPONDENT TQ Ltd

The Tribunal orders:

TQ Ltd is to pay \$274.49 to ED Ltd on or before 24 August 2023.

Reasons

1. ED Ltd engaged TQ Ltd to supply metal windows and matching double doors. TQ Ltd emailed ED Ltd a written quotation dated 14 April 2021 for \$27,077.72 incl. GST and ED Ltd accepted the quotation by paying the required 50% deposit on 20 April 2021.
2. Due to building delays ED Ltd was not ready to proceed until early January 2023 at which point they contacted TQ Ltd and were advised that, due to price inflation over the long period of delay and changes in availability of materials, the pricing of the job would increase to \$34,949.40+GST. ED Ltd was of the view that TQ Ltd was obliged to perform the contract at the quoted price and gave TQ Ltd an opportunity to proceed on that basis.
3. TQ Ltd declined to proceed and ED Ltd proposed repayment of its deposit plus a sum for damages summarised as being equivalent to 10% interest per annum for use of the deposit funds since April 2021. When TQ Ltd disputed payment of any amount over and above the original deposit figure, ED Ltd increased its interest claim to 15%.
4. TQ Ltd refunded the deposit of \$13,538.86 on 20 July 2023. ED Ltd therefore adjusted its claim from \$16,382.74 to \$3604.57 based on 15% pa interest (in lieu of quantified damages) to today's date.
5. The issues to be determined are:
 - Do TQ Ltd's terms and conditions apply?
 - If so, what is the effect of clause 4.2 of the contract terms and conditions?
 - Is TQ Ltd liable to pay interest and if so, at what rate and for what period?

Do TQ Ltd's terms and conditions apply?

6. I find that the terms and conditions attached to the quotation were accepted when the contract was formed. The contract was formed when ED Ltd paid the deposit on 20 April 2021. CB for ED Ltd argues that he did not sign the quotation therefore he did not accept the terms and conditions.
7. However the quotation was sent by email and it is relatively common for contracts to be formed without a signature. Acceptance was via payment of the deposit and I note that payment of a

50% deposit is recorded not on the front page of the quotation with the pricing, rather it is a term contained within the accompanying terms and conditions. Unless it had been explicitly stated upon acceptance that particular terms were not accepted, acceptance of the quoted price includes acceptance of the terms and conditions.

What is the effect of clause 4.2 of the contract terms and conditions?

8. Clause 4.2 of the terms and conditions provides *“The Price may be increased by the amount of any reasonable increase in the cost of supply of the Goods that is beyond the control of [TQ Ltd] between the date of the agreement and delivery of the Goods.”*
9. I find that the above terms means that there has been no repudiation of the contract by TQ Ltd. They were entitled to increase the price of the job in early 2023 in the event that the cost of the supply of the goods had increased since April 2021. NJ for TQ Ltd pointed out that the delay in the job was nothing to do with TQ Ltd, they had been ready to perform the contract since it was formed. CB for ED Ltd acknowledged that ED Ltd had not been in a position to proceed with the job until early 2023. In that context, CB’ statement that TQ Ltd had not contacted ED Ltd at all during the intervening period is of no consequence – TQ Ltd was simply waiting for ED Ltd to be ready to proceed with measurement and ordering.
10. Further, I do not accept CB’s contention that TQ Ltd should have protected ED Ltd from price increases by ordering the materials as soon as the deposit was paid in April 2021. Given that ED Ltd was not ready to proceed until early 2023 I do not consider that position to be reasonable and note that TQ Ltd was under no contractual obligation to order materials upfront before their customer was ready to go ahead. CB says he is aware of other suppliers such as builders who have done that during the Covid years to protect against material price increases. However if he had wished for that to occur, he would need to have negotiated that as a term of the contract. TQ Ltd would then have had to store the materials for ED Ltd for almost 2 years as it transpired.
11. CB also provided a copy of an article which he says was on the NZ Building Disputes Tribunal website (although the article heading from that website provided and the article provided do not match) which refers to a Queensland District Court case which found that a builder’s decision to terminate a building contract because it was unable to meet escalating industry costs was not a lawful basis for termination. On those minimal facts, that appears to be a perfectly reasonable decision. Contracts cannot be cancelled without good reason. However that is a different position than exists in this case. The existence of clause 4.2 within this contract, as already discussed, allows TQ Ltd to increase the price in certain circumstances.
12. When the dispute arose, the parties essentially reached a mutual agreement to end the contract. TQ Ltd agreed that the original deposit amount paid would be refunded. The only dispute remaining was whether or not interest was payable by TQ Ltd.

Is TQ Ltd liable to pay interest and if so, at what rate and for what period?

13. The contract was still afoot in early 2023 when ED Ltd asked TQ Ltd to proceed and TQ Ltd advised of a price increase. Due to the finding that there was no repudiation or breach on the part of TQ Ltd, ED Ltd cannot claim damages, whether in the form of interest or otherwise. I note that even if TQ Ltd had repudiated or breached the contract, ED Ltd would have to have quantified and proven its actual damages rather than converted them into a representative interest rate. There was no agreement for TQ Ltd to pay interest under the contract and such a term cannot be unilaterally introduced.
14. However, I consider it reasonable for TQ Ltd to pay interest based on its failure to repay the original deposit amount immediately upon agreeing in early 2023 that a refund was payable. ED Ltd proposed that the original deposit be refunded with the disputed amount to be ‘decided in

Court'. TQ Ltd sought to make repayment of the deposit amount the end of the matter. When ED Ltd did not agree to that, TQ Ltd should have refunded the deposit amount promptly.

15. For the above reasons, I find that TQ Ltd is liable to pay interest as per the Interest on Money Claims Act 2016 from 9 February 2023 to 20 July 2023, an amount of \$274.49.

Referee Perfect
Date: 27 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>.