



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 471

APPLICANT EK

RESPONDENT J Limited

The Tribunal orders:

1. J Limited is to pay EK \$220.00 on or before 8 September 2023.
2. EK is not liable to pay J Limited \$3,225.75 for invoice 1163 dated 16 November 2022.
3. The balance of the claim by EK is dismissed.

Reasons

1. On 29 January 2021 EK and UL (trustees of L Trust) entered into a contract with J Limited (J Ltd) to purchase a house and land package at [Town]. After the house was handed over on 1 November 2021, EK advised J Ltd that some aspects had not been completed in accordance with the contract.
2. EK claims \$12,715.75 which includes; fridge water \$220.00, external stairs (L1 to L2) \$4,828.71, stair access to L3 \$4,190.85, refund for scullery bifold doors \$250.44 and non-liability for \$3,225 (invoice 1163 dated 16 November 2022) for the build of the additional wall and cupboard under the stairs.
3. The issues to be decided are:
 - a) What are the terms of the contract and what documents are included?
 - b) Was it a term of the contract that fridge water would be provided? If so, did both parties make a mistake when they agreed that fridge water was an extra that EK would have to pay \$220.00 to have included? If so, is EK entitled to a refund of the \$220.00 paid?
 - c) Was it a term of the contract that external stairs would be provided for accessing level 1 to level 2 on both sides of the house? If so, did J Ltd breach the contract by failing to put external stairs on the left side of the house? If so, is EK entitled to claim compensation of \$4,828.71 to get a second set of stairs built?

d) Was it a term of the contract that J Ltd would provide stair access to level 3? If so, did J Ltd breach the contract by failing to provide stair access to level 3? If so, is EK entitled to claim compensation of \$4,190.85 to get stair access built?

e) Did EK and J Ltd agree to vary the contract by removing bifold doors in the kitchen scullery? If so, what credit was agreed for this variation and did J Ltd breach the contract by failing to give the credit? Is EK entitled to compensation of \$250.44?

f) Did EK and J Ltd agree to vary the contract by creating a wall and understairs cupboard for the internal stairs, which would be priced up on a charge-up basis? If so, does EK owe J Ltd \$3,225.75? If not, is he entitled to an order that he is not liable for \$3,225.75?

What are the terms of the contract and what documents are included?

4. The general principles of the law of contract apply to this dispute. A contract is an agreement that the parties intend to be legally bound by. It includes an exchange of promises and becomes binding when clear and certain terms are agreed. If a party does not carry out their obligations under the contract, it is likely they will be in breach of the contract, which may entitle the other party to compensation.
5. The parties entered into a Fixed Price Building Contract on 31 January 2021, for \$452,593.60. It included a Building Specification document signed by EK and UL on 31 January 2020 and was based on the site plan and drawings dated 29 January 2021.

Was it a term of the contract that fridge water would be provided? If so, did both parties make a mistake when they agreed that fridge water was an extra that EK would have to pay \$220.00 to have included? If so, is EK entitled to a refund of the \$220.00 paid?

6. I find that it was a term of the contract that fridge water would be provided. As pointed out by EK, 14(c) of the Building Specification states that fridge water and an icemaker would be provided.
7. However, Mr J (director) states that this appeared in the document by mistake, probably because it was mistakenly ticked on the template. When EK asked to have fridge water, Mr J told him it would cost \$220.00. EK said didn't realise it was in the contract, so he paid \$220.00. However, later on he realized it was in the contract, and he shouldn't have paid it.
8. I find that the parties are bound by the terms of the contract. J Ltd had a duty to provide fridge water as part of the contract price. Therefore, EK did not have to pay for it. I find that EK is entitled to a refund of the \$220.00 paid.

Was it a term of the contract that external stairs would be provided for accessing level 1 to level 2 on both sides of the house? If so, did J Ltd breach the contract by failing to put external stairs on the left side of the house? If so, is EK entitled to claim compensation of \$4,828.71 to get a second set of stairs built?

9. I find that it was not a term of the contract that external stairs would be provided for accessing both sides of the house. Therefore, J Ltd did not breach the contract by failing to put external stairs on the left side and the claim by EK for \$4,828.71 is dismissed.
10. I find that the contract provided for one set of external stairs from level 1 to level 2 on the right-hand side. I make this finding for the following reasons:

a) The Building Specification, that formed part of the contract, showed pricing for the house plan [design], plus additional items which included "external steps from level 1 to 2". The price

for one set of external steps is \$3,900.00. In the absence of evidence to the contrary, I accept the evidence of Mr J that the price of \$400,000.00 for the [design] is a price for a house that sits on a flat site. Any changes to the plan, due to the sloping site incurred additional cost. This is supported by the additional price itemized for “split level price increases”.

b) The contract does not include a price for a second set of external stairs from level 1 to 2.

c) The only change to the contract price after the initial contract was signed was for additional lighting, which added \$1,016.41 to the contract, bringing the price to \$453,610.01, as stated in the email dated 10 February 2021 sent from Mr J to EK.

d) I have considered EK’s argument that the plan dated 29 January 2021 and the updated plan dated 10 February 2021 showed a set of external stairs from level 1 to 2 on both sides of the house. However, I accept the evidence of Mr J that the original set of external stairs on the left side of the house, were left on the plan in error by the architect. The stairs were moved to the other side of the house at the request of EK. Both sets of stairs are different sizes and there is no evidence to show that two sets of external stairs were priced in the contract.

Was it a term of the contract that J Ltd would provide stair access to level 3? If so, did J Ltd breach the contract by failing to provide stair access to level 3? If so, is EK entitled to claim compensation of \$4,190.85 to get stair access built?

11. The parties agree that the west elevation of the final plan showed a grass slope to provide access from level 2 to 3. EK says that J Ltd built a retaining wall with a fence on top, instead of a slope, and his access to level 3 was completely blocked. He believes that J Ltd had a duty to provide safe access to level 3. EK was forced to pay a contractor to remove a section of fence and build some stairs, to gain access to level 3.
12. Mr J says that the engineer made this decision. The engineer advised that the slope was too steep, was not safe and would result in soil and water erosion. The proposed slope would not be permitted by council, and therefore a retaining wall was necessary. J Ltd built and paid for the retaining wall, and it passed compliance with council. EK was advised about this change by Mr D at several site meetings. Mr D gave evidence that he told EK that stair access to level 3 was not included in the contract. He gave EK contact details for a contractor who could do the work, after the house was completed.
13. I find it was not a term of the contract that J Ltd would provide stair access to level 3, therefore J Ltd did not breach the contract and the claim by EK for \$4,190.85 is dismissed.
14. I find that J Ltd was required to make changes to the ground level at the request of the engineer. J Ltd had a duty to complete the exterior work in a manner that would be deemed compliant by council. J Ltd made the change required by the engineer at no cost to EK.

Did EK and J Ltd agree to vary the contract by removing bifold doors in the kitchen scullery? If so, what credit was agreed for this variation and did J Ltd breach the contract by failing to give the credit? Is EK entitled to compensation of \$250.44?

15. EK says that in a meeting with the kitchen maker, it was suggested that a bifold door be removed as it was not necessary. The kitchen maker said he would give J Ltd a credit for this change and said to talk to Mr J Ltd about a credit.
16. However, Mr J says that J Ltd did not agree to vary the contract by removing the bifold door in the kitchen and offering a credit. Mr J says he was not aware that that EK made this change with the kitchen maker. J Ltd did not receive a credit with the kitchen maker. However, the kitchen maker later told Mr J that extra cupboards were added into the scullery, and this

balanced out any change with the bifold doors.

17. I find that EK and J Ltd did not agree to vary the contract by removing bifold doors in the kitchen scullery and applying a credit to the contract. Therefore, J Ltd did not breach the contract by failing to give the credit and the claim for f \$250.44 is dismissed.

Did EK and J Ltd agree to vary the contract by creating a wall and understairs cupboard for the internal stairs, which would be priced up on a charge-up basis? If so, does EK owe J Ltd \$3,225.75? If not, is he entitled to an order that he is not liable for \$3,225.75?

18. EK says that there was no discussion with him about any variation in regard to the area under the internal stairs. He believes that J Ltd made a decision about what to do with the side of the stairs and completed it, without a variation being agreed to.

19. Mr D says that he did discuss the area under the stairs with EK on site. He says that on the plans the area under the stairs was open and the side of the stairs had rails. He suggested to EK that he could make better use of the space by adding a wall and a cupboard door, so that the space could be used for storage. Mr D says that EK gave the go ahead for the additional work on a charge up basis. The electrician, Mr I, gave evidence that he was present during this discussion on site and that Mr D said it would be a charge up cost.

20. While there may have been a discussion about the under stairs area, I find that there is insufficient evidence to prove that EK agreed that the area under the stairs would be altered on a charge up basis. In making this finding I have considered the following:

a) There is no written variation or email to confirm this agreement between the parties.

b) I find that the evidence of Mr I is unreliable because his evidence was inconsistent. He started out by saying that EK wanted a light under the stairs, so it wouldn't be so dark. However, after more questions were asked, he went on to change this evidence to say that it was about the scullery. A great deal of time has passed and therefore, it is not uncommon for people to forget exact details about a conversation.

c) EK has been very particular about every aspect of the pricing for this contract. I find that it is unlikely he would have agreed to a 'charge up' variation, given the inherent uncertainty of the outcome, when he had previously only agreed to fixed prices.

21. Therefore, I find that EK is entitled to an order that he is not liable to pay \$3,225.75 for the work completed under the stairs.

Conclusion

22. Therefore, I find that EK is successful in his claim for a refund of the \$220.00 paid for fridge water. The balance of the claim for compensation is dismissed. EK is entitled to an order that he is not liable to pay \$3,225.75 for invoice 1163 dated 16 November 2022.

Referee: Sara Grayson

Date: 17 August 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>.