



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 676

APPLICANT **FB Ltd**

RESPONDENT **HE**
& COUNTER-
CLAIMANT

RESPONDENT **QE**
& COUNTER-
CLAIMANT

The Tribunal orders:

HE and QE, jointly and severally, shall pay FB Ltd \$9,042.32 by 21 December 2023.

HE and QE's counterclaim is dismissed.

Reasons:

1. On 19 July 2021, HE and QE contacted FB Ltd regarding whole-house replacement of the windows and doors in their 100+ year old villa. There were multiple (14) re-designs and quotes (10) before HE and QE accepted the tenth quote but requested the final amount be reduced by \$2,697.00 to make it an even \$100,000.00. The written contract was dated 1 October 2021.
2. The doors were to be full-replacement and the windows were to be insert replacements. Inserts use the existing frames and full replacements require new framing. Inserts are less expensive, but the windows end up slightly smaller than the originals as the new window unit fits inside the original opening. Full replacements require structural framing and are more expensive due to the additional labour and materials required.
3. Each window and each door were individually discussed as to design and specifications and a computer- aided design (CAD) drawing was produced for each one. HE and QE approved the final quote, which included all the specifications and CAD drawings and initialled each page and signed the quote.
4. On 6 October 2021, before starting the manufacture of the windows and doors, a complete walk-through and re-measure was carried out with HE and QE present and the final sign-off was approved by HE and QE. HE and QE' primary concern was that the new joinery be in keeping with the original design of the villa joinery. HE and QE made a final design change to door W12 and then final sign-off was given and HE and QE paid the deposit of \$38,403.00.

5. When the manufacturing was complete, HE and QE paid the second instalment of \$38,404.00 on 29 April 2022.
6. The installation took place in June 2022 and on 1 July 2022, FB Ltd issued the invoice for the final instalment of the contract price, \$23,193.00, which was due on 8 July 2022. HE and QE paid \$10,000.00 three weeks later, on 21 July 2022. HE and QE did not file a payment schedule and withholding payment of the contract price was contrary to the terms of the contract.
7. HE and QE were unhappy with the W12 door once it was installed as they felt the opening was too narrow. FB Ltd states that this was specifically discussed with HE and QE when it was changed by HE and QE during the design revision at the final walkthrough but HE and QE insisted and signed off on it.
8. The contract price did not include any repair work that might be required once the removal and installation was underway, such as rotten timber or other unseen structural defects. The contract required that any such defects had to be made good before installation could be completed.
9. There were four variations to the contract for repairs, including a major structural repair to the sunroom. There was rotten framing timber and the existing lintel was inadequate to support the new wall of windows and was not to code as it was joined and therefore had to be strengthened. Other repairs elsewhere in the house were required for rotten window timber and flooring timber, which FB Ltd had to make good.
10. Invoice 1838 was issued on 29 July 2022 for the additional work. HE and QE only disputed the work relating to variation 4 but failed to pay for any of the variations.
11. FB Ltd filed this claim on 23 November 2022 for \$30,000.00, seeking the outstanding balance of the contract price, \$13,193.00, \$12,360.20 for the variations invoice and interest.
12. On 24 November 2022, HE and QE made a payment of \$15,273.00. Despite only disputing variation 4 (sunroom), HE and QE only paid the \$2,080.00 towards the undisputed variations and the \$13,193.00 balance of the contract price, after this claim was filed. HE and QE dispute the extent of the variation 4 repairs and suggested that FB Ltd should have left rotten timber as it was.
13. After HE and QE's payment of \$15,273.00 on 24 November 2022, FB Ltd amended its claim to \$14,727.00 on 14 February 2023.
14. HE and QE filed a counterclaim on 23 January 2023 for \$30,000.00. The majority of the quantum of the counterclaim is based on HE and QE's calculation of what FB Ltd had charged for particular doors they are now unhappy with, not on remedial work quotes. HE and QE went out after the first hearing and obtained reports and remedial quotes, including for additional defects not raised before.
15. The issues are: Are HE and QE liable for the balance of the variations/additional work invoice? Are HE and QE liable for interest? Is FB Ltd liable for the replacement of the 4 doors that HE and QE are now unhappy with? Was FB Ltd required to install flashings? Is FB Ltd liable for the damage to the benchtop? Are HE and QE entitled to the \$30,000.00 they have counterclaimed?

Are HE and QE liable for the balance of the variations/additional work invoice?

16. The original sunroom joinery was a 4 section French door and two separate blocks of 2 and 8 windows across the front and another block of 4 windows on the side, which was slightly lower than the front windows. The new joinery was a 4 section French door and a one block of 8 windows the entire length of the front and a block of 4 windows on the side.

17. HE and QE argue only 1 corner post was required for variation 4 work, which should only have taken a couple of hours. The photos supplied by both parties show the work was significantly more than that. The structure around the windows and doors had to be made good and to code.
18. The sunroom work involved placing a temporary roof support apparatus, removing the corner post, replacing it with new and concreting it in; replacing the sill; strengthening the lintel, which HE had originally advised was a single beam across both blocks of the front windows but was found to have a join. A joined lintel was not to code and would not support the weight of the new continuous span of windows. In the process, FB Ltd took the opportunity provided by the structural work to level the side block of windows with the front windows. HE and QE directly paid the [building supply] account for all the materials required for the work and saw the work being done, raising no objection and saying nothing, allowing the repair work to continue and then refusing to pay for it.
19. The Tribunal does not find that the slight bow in the long bank of front sunroom windows is a defect. This is an old house with new, precise joinery units being installed into an old, out-of-plumb structure.
20. The Tribunal finds that the variation 4 work was necessary to make good the structure and that such work is additional work pursuant to the terms of the contract.
21. In addition to variations 1-4, FB Ltd had also charged extras of \$307.05 for extra glass for the laundry and \$660.10 to change the entry glass from etched glass to cathedral glass, per HE and QE' requests.
22. The variations invoice also included a charge of \$767.62 for rubbish removal. The contract price included a \$500.00 rubbish removal allowance, but this has not been credited on the variations breakdown, so the Tribunal does so here.
23. After the second hearing, HE and QE paid a further \$1,495.00 on 28 July 2023 for the undisputed portion of the variations/additional work invoice.
24. Accordingly, the Tribunal finds that HE and QE owe a balance of \$8,285.20 on the variations/additional work invoice.

Are HE and QE liable for interest?

25. The contract states that FB Ltd can charge 2% interest per month on unpaid amounts. HE and QE did not pay the final instalment of the contract price when it was due on 8 July 2022, nor did they submit a payment schedule as required by the Construction Contracts Act 2002, which meant no monies could be withheld.
26. HE and QE made a part-payment of \$10,000.00 two weeks after the due date, which equates to a half month on the full pre-GST amount, being \$201.68. The balance was not paid until 4 months later, which is an additional \$1,055.44, for a total interest amount of \$1,257.12.
27. The Tribunal does not award interest on the variations/additional work invoice as the invoice did not indicate that it was for variations and lacked sufficient detail as to the work and charges included in the invoiced amount. No breakdown of the invoice was provided until July 2023.
28. Accordingly, the Tribunal finds that HE and QE are liable for interest in the amount of \$1,257.12.

Is FB Ltd liable for the replacement of the 4 doors that HE and QE are now unhappy with?

29. The Consumer Guarantees Act 1993 (CGA) applies. The CGA requires that HE and QE notify FB Ltd of any defects within a reasonable time. HE and QE notified FB Ltd that they were unhappy with the width of the door W12 opening shortly after installation.

30. HE and QE were unhappy with FB Ltd's response and added a complaint about door W18 as well. As time has gone by and matters not resolved to HE and QE' liking, they have gone on to add more issues to the list, now including all doors, which they sent to FB Ltd in September 2022, which raises the issue as to whether the alleged defects were notified within a reasonable time.
31. The parties met on 23 September 2022 and 13 October 2022 to discuss the issues. HE and QE agreed to a tentative agreement which involved FB Ltd getting a price to either modify or replace door W12 and that the parties would share the cost at a split to be determined once the cost was known. HE and QE would then pay the outstanding balances owed to FB Ltd. HE and QE agreed in theory but were awaiting the design and price of the W12 door.
32. On 16 November 2022, HE and QE then made a proposal taking it back to seeking replacement of door W12 by FB Ltd and they would pay the outstanding balances. When FB Ltd did not agree, HE and QE have proceeded to add the various alleged defects in response to this claim and even more in the counterclaim.
33. The crux of the dispute here is the width of the door openings. The contract, including the specifications and CAD drawings that are based on the width of the door and window units. HE and QE signed off on the contract documentation, which was not based on opening widths.
34. HE and QE claim that this was not explained to them, that they did not understand this and that FB Ltd had told them the new joinery would be "like for like" with the old joinery, however the CAD drawings show with arrows the measurement points.
35. "Like for like" is terminology used to distinguish if the work is structural and requires Council consent or not. HE and QE interpret like for like to mean the new joinery will be the same as the old, but that is not possible nor what was contracted for. For these doors to be like for like in HE and QE's interpretation, they would be old timber single glazed units.
36. The law of contract applies. If there are verbal agreements that are contrary to the written agreement, the written agreement prevails as it is proven in writing and not subject to differing recollections or interpretations.
37. Further, FB Ltd states that when they did the final walk-through measurement to confirm all the specifications on 6 October 2021, HE and QE only then identified that W12 was different to W18, which were originally matching French doors in different rooms. W18 was wider than W12 and FB Ltd advised HE and QE that W12 should be reconfigured to match W18 but HE and QE decided the opposite and instructed FB Ltd to make W18 narrower to match W12 as HE and QE's primary concern was for the joinery to look as close as possible to the original joinery.
38. FB Ltd made the change instructed by HE and QE and had HE and QE again sign off on the change as it was against their advice.
39. The CGA states that a consumer cannot claim a defect if the consumer has directed the work to be done in that way. There is no dispute that the door openings are too narrow but that is what HE and QE contracted for and what they specifically instructed for W12 and W18.
40. If HE and QE were uncertain or did not understand the specifications, then they had a duty of due diligence to seek advice before signing the contract with those specifications. It is unreasonable for HE and QE to expect FB Ltd to replace custom made doors at no charge if HE and QE changed their minds or signed a contract they did not understand.
41. Accordingly, the Tribunal finds that FB Ltd is not liable for any replacement doors.

Was FB Ltd required to install flashings?

42. As above, the windows were inserts and the doors full replacement under the contract.

43. As the door frames were being replaced, they required new flashings. As inserts, the windows were inserted into the existing frames and the existing flashings remained.
44. The sunroom windows became full replacements when the configuration was different from the original configuration and the rotten timber and inadequate lintel were discovered and new framing built, therefore new flashings should have been installed.
45. The Tribunal agrees that HE using a water blaster upwards into the top of the windows under the eaves is not a fair and reasonable test of weather-tightness.
46. HE and QE apparently subsequently contracted the FB Ltd builder/installer directly to install flashings and no evidence as to what was done or at what cost has been presented.
47. The Tribunal allows a \$500.00 credit for HE and QE as FB Ltd failed to install flashings for the sunroom windows.

Is FB Ltd liable for the damage to the benchtop?

48. Carrying out a whole-house windows and doors replacement is a substantial and invasive job, affecting every room in the house. It would be miraculous for such work to not result in some minor accidental damage to surrounding areas and objects.
49. For FB Ltd to be liable, it would have to be shown that FB Ltd or its subcontractors, were negligent (careless) in the manner they carried out their work.
50. One of the subcontracted workers was working on a window from above the kitchen bench in June 2021 when his hammer slipped and hit the back edge of the timber kitchen bench.
51. The worker, who was a joiner, offered to fix the bench and it was agreed that if the repair was unsuccessful, they would hire a tradesperson to do it. Subsequently HE and QE refused access for the repair, which is required by the CGA, thus HE and QE lost the right to a remedy.
52. There was a quote obtained by FB Ltd in June 2021 to repair the bench for \$2,856.60 but HE and QE refused to allow the repair. FB Ltd obtained another quote on 21 March 2023 for \$6,024.51, more than double the previous quote nearly 2 years before but still no agreement or access by HE and QE.
53. It has been 2.5 years since the bench was damaged and no repair has been done, indicating that HE and QE have accepted the minor damage.
54. Despite not being obligated to repair in the absence of any evidence of negligence, FB Ltd repeatedly offered to repair but HE and QE refused so the matter is at an end.
55. Accordingly, FB Ltd is not liable for the damage to the benchtop.

Are HE and QE entitled to the \$30,000.00 they have counterclaimed?

56. The counterclaim is for \$27,079.84 for the amount HE and QE have calculated that FB Ltd charged them for the 4 doors they are now dissatisfied with, \$500.00 for interior painting of the sunroom and \$200.00 for exterior siding replacement for the sunroom.
57. Under the CGA, claims are based on remedial repair or replacement cost by a third party if the supplier has refused to remedy a defect.
58. HE and QE did not notify FB Ltd of the defects they now complain of within a reasonable time, with the above noted exception of door W12.
59. The Tribunal has found that FB Ltd are not liable for replacement of any doors or windows.

60. The Tribunal has already found that the sunroom repairs were necessary and not included in the contract price.
61. The contract expressly excluded painting or reinstatement work that might be required by such repairs or the installation.
62. HE and QE subsequently went out in April 2023 and obtained a quote for the replacement of 4 doors for \$21,358.03, not including delivery or installation and it is noted that the measurements were provided by HE and QE, not done by the supplier.
63. HE and QE then amended their claim for the sunroom reinstatement work from \$700.00 to \$2,057.72, including a reimbursement of the building materials they had paid by agreement.
64. HE and QE have refused repeated offers of settlement by FB Ltd, including a replacement of door W12 at FB Ltd's expense, which is what HE and QE' originally asked for, but HE and QE have rejected all offers and counter with an ever-increasing list of demands and alleged defects and obstruction of FB Ltd's offers to complete the minor items such as installation of door stops.
65. It has been 2.5 years since the installation was done and HE and QE have not incurred any remedial expenses to date. The timeline and communications between the parties indicates that HE and QE' counterclaim and growing list of alleged defects is disingenuous and intended only to avoid payment of the outstanding account.
66. Accordingly, the Tribunal finds that the counterclaim must be dismissed.

Referee: L. Mueller

Date: 6 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>.