IN THE DISPUTES TRIBUNAL **[2019] NZDT 1145**

BETWEEN	**FR Ltd** APPLICANT
AND	**TI** RESPONDENT
Date of Order:	12 April 2019
Referee:	Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim is dismissed

Facts

[1] FR Limited (the company) had a contract to test and maintain the fire and sprinkler systems at two apartments owned by Mr TI. The contract required monthly attendances to check the systems, and an annual survey. This work is required to be done to meet independently identified safety standards (NZS 4512:2003). Confirmation to Council of completion is required to enable the building to retain its warrant of fitness.

[2] The contract specified a price for the services of $986.24 + GST. Additional callouts (e.g., for actual or false alarms) were to result in extra fees at quoted prices ($25.00 per job for mileage, $125.00 plus $85.00 per extra hour during normal business hours, or $175.00 plus $105.00 per extra hour outside normal business hours).

[3] The company attended two callouts for false alarms. The first occurred on 12 June 2018. A detector in the area next to the kitchen had bug larvae inside. The detector was replaced. The cost for this callout was $312.26. A second occurred in the early hours of the morning on 12 October 2018. The invoice records an arrival time of 4.30 a.m. A different detector had a spider and cobwebs in it. The detector was cleaned and reset. This callout cost $201.25.

[4] Mr TI has not paid for these callouts, as he considers that the company has failed in its contractual duties to maintain the alarm system. The company has filed a claim for their payment ($513.51).

[5] The issues to be resolved are: (a) Has the company provided its service with reasonable care, and to ensure it is fit for purpose? (b) If not, is any sum due to the company?

Has the company provided its service with reasonable care, and in a manner that is fit for purpose?

[6] The company is providing a service to which the Consumer Guarantees Act 1993 applies. Consequently, the company is required to ensure that it carries out its services with reasonable care and skill (s28), and in a manner that results in a product that is fit for purpose (s29).

[7] The contract is headed up “testing agreement”. However, both the quote and correspondence at the time the contract was entered into refers to the testing and maintenance of the safety systems at the property. The wording of the contract also refers to both testing and servicing.

[8] However, under the terms of the contract, the annual fee only covers testing to the standard required in the Council Compliance schedule (for the fire system, this is NZS 4512:2003). The monthly test requires one detector to be tested. The annual survey requires 20% of the detectors to be tested, and all detectors to be visually checked. However, at no stage are all or any of the detectors required to be taken down and checked inside or cleaned.

[9] It appears that the company fulfilled its testing obligations under the contract. Mr TI was concerned that the company had not had access to the apartments to complete the full annual survey, but this could not be proved, and records supplied by the company suggested otherwise. Mr TI was also concerned that monthly testing could not be adequately conducted to the appropriate standard with access to one level of the property only, and that no test book was retained on site. Again, there was insufficient evidence of any breach of the testing standards or contract in the methods adopted.

[10] Nonetheless, I am satisfied that the company failed to provide its service with reasonable care and in a manner that is fit for purpose. This is so for three reasons.

[11] First, the company failed to provide Mr TI with the compliance schedule that it had intended to send him, as it did not attach this to the email it send him prior to the contract being signed. This schedule would in theory have helped Mr TI to identify that the contract was only a testing regime and contained no internal checking or maintenance of detectors. Nothing turns on this, as it is considered that most customers would not read the contents of that schedule closely enough to identify the limits of the testing requirements. However, the email was missing an attachment that had been intended to be sent. On its own, this would not have founded a claim, but it adds to the overall experience for Mr TI of the management of the contract.

[12] Secondly, a customer who purchases a testing regime is expecting to be confident that the alarm will trigger when it is needed. However, the customer is also expecting that it will not trigger when it is not needed. The consequence of a false alarm is considerable. The noise and disruption, particularly if it is in the night, is major, and a callout fee is incurred. The

testing regime in the contract is only designed to meet the requirements of NZS 4512:2003. This does not require that any detector be checked for bugs. The Standard is only concerned safety in the event of a fire, not with saving customers from the cost or inconvenience of a false alarm. However, the detectors trigger as soon as a bug gets in the way of the light beam within the unit. The company established from its own evidence that this is a common occurrence. An article was presented by the company which stated that: "Unwanted alarms are the bane of the fire protection industry, with many false alarms caused by bugs in detectors, particularly in the warmer months." The article then proceeded to recount several incidents of false callouts from tiny bugs inside detectors that are so small they are hardly visible to the naked eye. The company estimated that approximately 30% of its callouts are from false alarms caused by bugs. The company also stated that this risk can be substantially eliminated by fumigating the detectors.

[13] It was established that this property had previously had a false alarm caused by bugs in 2011. Mr TI was not the owner at the time and was unaware of this. In 2017, Mr TI was not advised to fumigate his detectors when he signed his own contract with the company. The first false alarm in June 2018 was caused by bugs. The company advised Mr TI about the risk of bugs, and suggested fumigation, but not until 10 October 2018. The next false alarm was triggered two days later, on 12 October 2018. The advice about fumigation was not given soon enough to reasonably avoid the second event. Fumigation is a simple and cost-effective solution to avoid the risk. It is arguable this advice should be given to all customers at the start of every contract given the risk of costs incurred, particularly in light of the high incidence of callouts and the lack of advice to Mr TI about the limits of the testing regime. I am certain that this advice should at the very least have been given to Mr TI as soon as the June false alarm occurred, particularly given this was the second event at that property. Had the company exercised due care with timely advice, I am satisfied that the second callout in the middle of the night would most likely have been avoided.

[14] I have had regard to the company's submission that there are a number of causes of false callouts that the company is not responsible to protect its customers from, such as cooking emissions (e.g., burning toast). This is correct, but this is a risk within the control and knowledge of the customer. Bugs in detectors are not a known risk and yet are a significant threat to the reliability of the system. As this is not a safety issue, the testing regime does not cover it. A customer has no knowledge of the problem unless advised to take the simple step required to avoid the risk. I am satisfied that the alarm system in the house that has a history

of bugs is not monitored in a manner that is fit for purpose unless this advice is given in a timely manner.

[15] Thirdly, the company took 1 hr 53 mins to respond to the second callout. This was in the early hours of the morning. The alarm sounded for this period. The contract does not specify a response time, but the company acknowledged that an hour is considered standard. I am satisfied that two hours is excessive. The extra time resulted in a major inconvenience given the disruption and impact on the occupants.

Is any sum due to the company?

[16] Where failings occur that cannot be remedied, a customer is entitled to treat a contract as cancelled (s32(a)(b)(i)). This entitles the customer to a refund of all sums paid or payable (s38), except to the extent that services of value have been received (s39), plus any reasonably foreseeable consequential losses (s32(c)).

[17] Mr TI did not file a counterclaim seeking a return of all testing fees paid, and in fact, value has been received by the ongoing supply of these up until the arrangement ended. However, I am satisfied that the breaches outlined above in relation to the two call outs could not be remedied, and that this provides a full defence to the claim for the call out fees claimed.

[18] I have had regard to the fact that the first call out was the first for Mr TI with bugs and it resulted in a replaced detector. However, I consider that the failure to give more timely advice after that incident resulted in an experience with the second call out that outweighed any material benefit from the replacement of the detector in the first callout, and the provisions of the Act do not entitle a company to recover additional payments after valid cancellation unless it is considered just in the circumstances (s39(1)). Taking into account Mr TI's overall experience with the contract, I am satisfied that no further sum is due.

[19] For these reasons, the claim is dismissed.