



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 771

APPLICANT H Ltd
FIRST RESPONDENT QH
SECOND RESPONDENT U Ltd

The Tribunal orders:

1. The claim against QH is struck out.
2. The name of the second respondent is amended.
3. The claim is dismissed.

Reasons:

1. H Ltd placed a concrete driveway and paths for U Ltd in late 2021. It says it is owed \$4,250.00 for its final invoice.
2. The claim was previously heard by a different referee and an order made against U Ltd. A rehearing was later granted, and the matter has been fully heard again.
3. U Ltd filed a counterclaim, which was withdrawn at a previous hearing. Shortly before the current hearing U Ltd advised that it was seeking a refund of a \$1,000.00 overpayment it believed it had made. However, it has not filed a counterclaim seeking repayment. Therefore, the alleged overpayment is at most a factor that can be taken into account in deciding whether it owes anything to H Ltd.
4. M represented H Ltd and QH represented himself and U Ltd.

Background

5. U Ltd contacted H Ltd for a quote in late September 2021. The parties met on site a few days later. U Ltd said it had a budget of \$10,000.00 for a garage pad, driveway, and front path. It had already laid metal for the driveway and garage and says it told H Ltd to follow the line of the metal. H Ltd disputes this.
6. H Ltd provided a quote for \$8,250.00 for 110m² of concrete (i.e., \$75.00/m²), plus an estimated \$600.00 for excavation, cartage, and metal, and an estimated \$300.00 for drainage.

7. In October, U Ltd asked H Ltd to remove the garage area from the contract. The parties agreed to a \$1,000.00 reduction in the price.
8. H Ltd boxed up the driveway and front path in late November. The parties met on site a few days later. U Ltd says it told H Ltd the boxing was in the wrong place: the corner of the driveway adjacent to the garage area was in the middle of where the garage was to be located; on the other side of the driveway the boxing did not follow the line of metal and did not provide a sufficient turnaround area; and the area in front of the house was wider than necessary for a pathway. U Ltd said the driveway boxing would have to be altered and it also asked for an additional pathway at the back of the house.
9. H Ltd says it advised U Ltd that re-boxing the driveway would cost extra, and that U Ltd agreed to pay. U Ltd says it agreed to pay extra for the path to the back door, but that re-boxing the driveway was a case of H Ltd correcting its own error.
10. The driveway was re-boxed, and the concrete placed. H Ltd sent a final invoice for \$13,850.00. U Ltd objected and paid \$9,600.00 based on the original quote and its estimated cost for the back path.

Law

11. The law of contract applies. Contracts are interpreted objectively, taking into account the wording of the contract and the background circumstances.

Who were the parties to the contract?

12. H Ltd's claim was initially against QH personally. U Ltd was added as a party later.
13. When QH first contacted H Ltd, he sent a text message "*Hi ya [redacted] email for [address] ... Invoice to [QH], [U Ltd]...*". Although QH referred to both his name and the company name, it is clear that he was referring to himself as the contact person and that the contract was intended to be with the company. I have therefore struck out the claim against QH personally.

What were the terms of the contract?

14. The parties agree that U Ltd had a budget of \$10,000.00. When the parties met on site, U Ltd believed that the driveway would follow the line of the metal that was already laid. H Ltd says the driveway was not specifically tied to the metal area and that the contract was for 110m² of concrete, to be placed in the most suitable location.
15. I accept that there was a genuine miscommunication between the parties. However, there are several factors that favour U Ltd's interpretation of the contract. First, it made sense to align the concrete driveway with the metal area. Otherwise, U Ltd would have to remove the metal previously laid and reinstate lawn or gardens. Secondly, it made no sense to locate the corner of the driveway in the middle of the area where the garage was to be built. If the garage had not been removed from the contract, the driveway would not have been aligned this way. Thirdly, the driveway as originally boxed did not allow for a turnaround area.
16. H Ltd accepts that it did not take any spray paint or other means of marking the line of the driveway. As a prudent contractor it should have done so, as this would have ensured there was no misunderstanding. I accept U Ltd's evidence that it believed the 110m² area quoted aligned with the metal area.
17. U Ltd raised the issue that the contract was for 25mpa concrete, but that only 20mpa was supplied. H Ltd acknowledged the error, but U Ltd has claimed any compensation.

What variations were agreed?

18. There is no dispute that the garage was removed from the contract, and that a back path was added when the parties met in November. I find that the only additional cost U Ltd agreed to was for the path. Although H Ltd may have genuinely believed U Ltd agreed to pay for the additional boxing and concrete, this is incompatible with my finding that the boxing was in the wrong place. Both parties had a different understanding of what the extra cost was to cover; but I find that U Ltd's understanding is the correct one.
19. U Ltd says that H Ltd did not give any indication before the work was completed that it would be charging an extra \$5,600.00. The additional cost was more than minor, and it would have been prudent for H Ltd to have provided an amended costing, especially as it knew U Ltd had a budgetary limit of \$10,000.00.

Does U Ltd owe any or all of the amount claimed?

20. Based on my findings, H Ltd cannot charge any extra for re-boxing the driveway or for the cost of laying the additional concrete.
21. H Ltd has provided two alternative methods for costing the back path. The first is based on \$100.00/m² for a 10m² path (i.e., 10m x 1m). It provided an alternative costing at the hearing based on \$650.00 for labour plus a portion of the extra concrete cost. U Ltd says the path is 7m long, which equates to \$700.00 based on the first methodology. It disputed that any excavation was required for the pathway and referred to a photograph showing it sitting above ground level.
22. It is likely that some levelling would have been required to lay the back path and some metal laid. I find that a calculation based on \$100.00/m² is reasonable (i.e., \$75.00/m² and the extra for labour and materials). That totals \$700.00.
23. H Ltd says the original estimate of \$300.00 for drainage was achieved. U Ltd says the length of drainage laid was reduced from 4.0m to 0.3m and that the cost should be reduced by half. However, as will be obvious shortly, no adjustment is necessary.
24. H Ltd says the cost of excavation and cartage increased from \$600.00 to \$1,279.80. Part of this was due to the need to re-box, which cannot be claimed. With estimates, there is an expectation that the cost will be within 10% to 15% of the estimate, so in this case up to \$690.00. The back path would have had minimal affect on the cost, and this would have probably been offset against removal of the garage. Therefore, I find that the maximum claimable is \$690.00.
25. Based on these findings, H Ltd was entitled to charge up to \$8,940.00, based on the original contract and agreed variations. This is comprised of \$8,250.00, less \$1,000.00, and plus \$700.00, \$300.00, and \$690.00. In fact, U Ltd has paid \$9,600.00, as it forgot to account for the \$1,000.00 garage deduction when calculating payment. In other words, it has paid more than I have calculated. However, as the amount paid is less than the original budget, and because U Ltd has not formally counterclaimed for a refund, no further adjustment is required.

Referee: J P Smith
Date: 14 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>.