(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2021] NZDT 1301**

APPLICANT **HB Limited**

RESPONDENT **HK and OK**

The Tribunal orders:

1. HK and OK to pay to HB Limited the sum of $3,953.13 on or before 12 February 2020.

Reasons

1. Mr and Mrs K (the owners) engaged HK Limited (the company) to complete drawings for a new house on their site. The total contract price, as set out in the Fee Proposal dated 12 September 2019, was approximately $40,000.00 + GST, with the work to be completed in three stages (concept, 3D renders and working drawings).

2. The owners cancelled the contract during the concept stage. They have not paid for the work done. The company filed a claim seeking payment of $20,000.00.

3. The issues to be resolved are: (a) Were the owners entitled to cancel the contract? (b) If so, how much is payable for the work done to the point of cancellation?

Were the owners entitled to cancel the contract?

4. I find that the owners were entitled to cancel the contract as the contract did not prevent this, and the company accepted the cancellation. The owners cancelled by email on 18 June 2020, and the company accepted this by return email, subject to payment of a fee for work done to date.

5. The contract was set out in three stages (concept $5,500 + GST), 3D renders $2,000 + GST, and working drawings, estimate $32,500.00 - $37,500 + GST. Some contracts of this nature preclude cancellation at all, or at least preclude cancellation mid-stage. However, the contract was simple in its terms, and simply set out the prices to be paid for each stage. It is arguable that a term should be implied that at least there be no cancellation mid-stage, but for a term to be implied it must be so obvious it goes without saying, and necessary to make the arrangement work. This is a high bar to meet, and if the company wishes to preclude cancellation during stages, this ought to be spelled out. It would be implied that any cancellation would need to be in writing, and provide reasonable notice, but it cannot be implied that the contract was fixed for its entire length, or for each stage. The company also expressed its agreement to the termination, and ceased work, charging a partial fee for Stage 1. This created a representation that it accepted the end of the deal.

6. The owners believed that they had an additional right to cancel under the Consumer Guarantees Act 1993, on the basis that the work was not done to a satisfactory standard, and thus without reasonable care and skill (s28). A substantial breach of this guarantee gives rise to a right to cancel. The owners were disappointed with the design aesthetic that was emerging in the concept

phase, but as the drawings themselves were workable, it is difficult for a person not qualified in the industry to make findings that the design aspects did not meet satisfactory standards. Aesthetics are very much a matter of opinion. The owners were concerned about the way in which the brief was presented initially, in a rushed meeting prior to Christmas, but it was hard to make finding about the nature of that interaction, and others, during the process. The owners were concerned that the company had produced a two-storey option, when they had only wanted a single storey, but at the concept stage, offering alternatives at no additional cost in the early design phase could not be viewed as a breach.

7. The owners were also concerned about considerable delays in the provision of the work. The contract estimated the concept phase would take 7-9 weeks (suggesting completion by the end of November 2019). However, initial delays were caused by the slow provision of information, some of which was not received until mid-November. The timeframe could therefore be taken from that period, resulting in a reasonable expectation of completion in late January or February (allowing for the holiday period). Initial drawings were provided prior to Christmas, and revised, following feedback, in mid-February. Therefore, whilst the work was done late, compared to the timeframes estimated in the contract, these timeframes were not specified to be off the essence, and the breach was not sufficient to justify a finding of a substantial breach, entitling cancellation under the CGA. Further delays in progressing the project in 2020 came about largely through a failure of the clients to engage, given their disappointment in the work.

8. Nonetheless, as the cancellation was communicated in June 2020, and accepted, the work came to an end at that time.

How much is payable for the work done to the point of cancellation?

9. The far more difficult question is to determine how much is due on cancellation, particularly as this occurred prior to the completion of Stage 1.

10. If cancellation occurs under the general law of contract, the Contract and Commercial Law Act 2017 (CCLA) sets out the factors to take into account in determining whether any sum is owed. These factors focus on the costs incurred, and value obtained, and terms of the contract, the reason for the cancellation, and any other relevant circumstances (s45). As the company is making the claim for payment, the onus would be on the company to prove a right to be paid. On the other hand, if cancellation occurs on the grounds of a substantial breach under the CGA, the starting point is that no sum is payable at all for the work (s38 CGA). The onus would again be on the company to prove that they had provided some value provided despite the termination, and a similar set of factors as those set out in the CCLA must be considered (s39 CGA).

11. As is explained above, it was not possible in this case to prove a substantial breach that entitled cancellation under the CGA. The owners did not take to the design, but this was a question of aesthetics, and there was insufficient evidence of a lack of skill. Timing was also drawn out, in part caused by the company. Whilst this may have been unsatisfactory, it fell short of amounting to a substantial breach. The cancellation is therefore one that must be assessed under s45 CCLA.

12. In looking at the factors under the general law of contract (s45 CCLA), consideration must be given to the terms of the contract. As indicated above, the contract did not preclude cancellation. The company is therefore not able to claim for expectation loss from the termination of the deal. The company was concerned that it had hired an additional staff member as a result of this contract. This is a business expense borne by the company and one that could not attributed to this contract as a factor to increase the sum due. The company took a risk on its open-ended contract that the work would proceed. The company sought $15,000.00 as compensation for this, and for the time spent in relation to the cancellation. This is not recoverable.

13. Consideration must also be given to value obtained and benefits received. The concepts and early drawings provided turned out to have no measurable value, as they were not used. The company believed the next architect had used the ideas, but a comparison of the plans showed this was not the case. The company claimed $5,000.00 + GST for intellectual property, but this fee was not specified in the contract as payable on cancellation. The designed was not used, and this fee

cannot be recovered. Nonetheless, the work done at least provided a point of view for the site, which the owners had the benefit of assessing, if only to decide they did not like it. This was the only benefit or advantage obtained, albeit one that cannot be measured. The usual source for valuing this would be the proportionate value of the stage reached at the point of cancellation, for want of any better measure.

14. A further factor to consider is the cost expended by the company. The company initially sought 70% payment for Stage 1, but by the time it filed its claim, sought 100% of Stage 1 ($5,500.00 + GST, plus a late payment fee). However, the proportionate value of the stage becomes something of a proxy for compensating expenditure, even if this does not end up reflecting fair compensation for the actual hours spent. It would be open to the company to structure its contract in a different way, but having an open-ended arrangement, and having allowed an exit, the full Stage could not be recovered when it was not complete.

15. The company pointed out that the owners did allow work to continue after revised floor plans were supplied in mid-February, which then resulted in the company spending more time on revisions despite the owners' dissatisfaction. Some elevations were also provided, but the final revisions on the floor plan were never signed off. The owners had sent a message with a revised deadline for the floor plan, with the threat of cancellation if this was not met (15/2/2020). However, the company had met that deadline. The owners then expressed their concerns about the job in an email of 10 March 2020, but did not clearly cancel. It would have been open to them to cancel at that time, but the first clear written cancellation was not until 18 June 2020 when cancellation was assumed, and the invoice was sent for 70% of Stage 1.

16. The company did remain able to perform the contract, but its ability to do so was limited by its inability to meet design expectations, and whilst this might not be a provable breach of the CGA, it reasonably brought the relationship to an end, as the contract allowed, and as the company accepted at the time. Having viewed the floor plans and the work to be done to revise this, I am satisfied that the invoice sent for 70% of the concept fee was a genuine attempt to measure where the project was at. The contract also specified a 5% per month interest rate for late payment penalties, and collection costs, but a rate of 5% per month is not a recoverable sum. A late payment rate can only relate to recovery of loss (the deposit rate or overdraft rate if incurred). In the absence of a recoverable interest rate in the contract, the Disputes Tribunal rate of 5% p.a. would be applied, which results in a relatively nominal additional to the award. As there was a genuine dispute in this case which resulted in delay, no interest is applied. No collection costs were incurred, and the filing fee and costs of the proceedings are only recoverable in the Disputes Tribunal in limited circumstances that do not apply in this case (s43 Disputes Tribunal Act 1988).

17. The company estimated that the Stage 1 fee ($5500) was made up of the floor plan (50%), elevations (35%) and the site plan (15%). The site plan had been fully completed ($825.00). Elevations were not fully completed, required revision, and are assessed at 50% complete ($962.50). The floor plan had more iterations to come and was closer to 60% complete ($1,650.00). This measure cannot be exact but is the best assessment based on the plans viewed and the evidence of the parties, including the company's own assessment of 70% completion. This assessment comes to slightly less than that (62.5%).

18. For these reasons, I have awarded the following:

Stage 1 fee:	$3,437.50
GST	$ 515.63
Total	$3,953.13

Referee:

J Robertshawe

Date: **13 January 2021**

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 28 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 28 days of the decision having been made. There is a $200 filing fee for an appeal.
You can only appeal outside of 28 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.