



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1329

APPLICANT HT

RESPONDENT IU

The Tribunal orders: IU is ordered to pay HT the sum of \$5,500.00. Payment of this sum is ordered no later than 30 April 2021.

Reasons:

- 1) In August 2020 the applicant provided the respondent with a quote for the painting of IU's house. This was for the amount of \$16,204.00.
- 2) The respondent has paid the applicant for the contracted painting work the sum of \$4,000.00. The applicant seeks an order for the balance of what he says is the sum quoted and owing to him. The respondent says that the quoted price of \$16,204.00 was [I here paraphrase] grossly excessive. Mrs U should not be bound by it.
- 3) The relevant law is the general law of contract and the Disputes Tribunal Act 1988 ('the Act'). The issues to be determined by the Tribunal are:
 - a) Was there a quoted price for the applicant's work which was accepted by the respondent?
 - b) If so, is the respondent bound by the accepted quote?
- 4) Further to the above, s.19(1)(e) of the Act provides that: "*Where it appears to the Tribunal that an agreement between the parties, or any term of any such agreement, is harsh or unconscionable...the Tribunal may make an order varying the agreement.*"
- 5) The quote referred to in paragraph 1) above was issued by the applicant prior to the work in question being carried out. It was accepted by the respondent. I am satisfied beyond question that a contract was formed based on the quote.
- 6) With respect to the respondent's challenge to the quote as being excessive, unfair and unreasonable, the starting point is that of 'sanctity' of contract. This tribunal, like any court or tribunal, is concerned with the enforcement of contracts, not interfering with them. It is not for this tribunal to rescue people from possibly bad bargains they may have entered into, including the price charged for the provision of services.
- 7) However, and that said, from the abovementioned starting point, or 'first principle,' there is an exception, and that is provided for in s.19 of the Act. If a term of a contract, including as to price, is 'harsh or unconscionable,' this Tribunal has the power to vary the relative agreement, or contract.

- 8) Consistent with the above preliminary discussion of this question, caution needs to be exercised before finding a contract term, as to price, to be 'harsh or unconscionable.' In practical terms, I consider there would be a relatively high bar to be reached by a party challenging an agreed term as to price as being harsh or unconscionable.
- 9) Further to the above, regard would have to be had to the context, and the surrounding circumstances. The fact that there is evidence that a price is high, or excessive, (even substantially so) would not, in general, be enough, in my view, to sustain such a finding. The question to be posed, I think, which I ask in this case, is whether the price is so far outside the range of what could possibly be reasonable as to be, in short, outrageous.
- 10) Absent evidence of misleading, or deceptive, conduct for the purposes of the Fair Trading Act 1986, it is difficult to conceive of a case in which a finding could be made that a term as to price is harsh, or unconscionable, as between commercial entities dealing with each other at arms-length. The contract between the parties in this case was, however, a consumer transaction in which there was clearly reliance by the respondent on the calculations of the applicant being accurate with respect to such things as the amount of paint required, and hours to do the job.
- 11) In support of his view, and position, the applicant has submitted 2 'quotes' from QO Painting Ltd (QO) and RL (said, in fact, to be an "estimate only"). The first of these figures is \$11,771.00 and the second, \$13,961.00.
- 12) In support of her view and position, the respondent has submitted 4 quotes, namely, ABC and Sons, \$5,060.00, B Decorating, \$3723.00, E Decorating, \$3,850.00, and HC, \$6,210.00.
- 13) With respect to the quotes submitted by the respondent, I make the following observations:
 - a) The range from the lowest, to the highest, of the respondent's quotes is \$2,487.00;
 - b) The average of the 4 quotes is \$4,710.00;
 - c) The applicant's contract quote is almost 3 ½ times the average of the respondent's quotes;
 - d) The difference between the applicant's contract quote, and the respondent's highest quote, (HC) is approximately \$10,000.00.
- 14) The respondent has submitted an email of 17 February 2021 from QU, [Redacted], of the Master Painters NZ Association. In this communication, Mr U says: "*The only fair way to get an understanding of the price of this work is for 3 independent local painting contractors to price the work based on the scope of works outlined in the original quotation. The average price of these 3 new quotations would give a good indication of the market price for this work. As with any tender type situation a range of prices would be expected.*"
- 15) Mr U did not appear. I will consider his statement, but the weight to be attached to it will reflect his non-appearance. Having said that, I would suggest that what he has to say would, in my view, accord with common sense. I record that the applicant did not indicate any disagreement with the substance of what Mr U had to say.
- 16) The applicant strongly challenged the quotes produced by the respondent. Mr T said the market price range for a job such as this would be \$12-14,000.00, plus GST. The applicant's challenge to the evidence produced by the respondent does not succeed. The sources of all 4 of the respondent's quotes attended, and inspected, Mrs U's home. Neither Mr O nor Mr L, for the applicant, did so. Neither Mr O, nor Mr L, are aware - even approximately - of the actual area of the respondent's home, a factor which I would have thought to be significant, to the point of being crucial.
- 17) Mr T says that the number of coats of paint to be applied is important in assessing the reasonableness of a quoted price. Ms FV, for Mrs U, arranged the respondent's 4 quotes. Her evidence is that the discussions with all who provided the 4 quotes was that they were based on an undercoat, and 2 topcoats.

- 18) If there were possibly options open to a consumer with respect to such things as the number of coats of paint (3 or 4) and the nature of the paint being used (in terms of the product base of that) I would suggest that [see paragraph 11) above] there is a responsibility on the service provider the consumer is relying on to inform the consumer of the options, and the cost implications. I do not believe Mr T did that. He submitted a quote to Mrs U based on what he, apparently, usually does, that is, 4 coats, and went ahead and applied 4 coats. On the basis of what I have heard, 3 coats would have been perfectly adequate.
- 19) Mr T suggests that those who have provided the respondent's 4 quotes would have needed to have seen what he did in August 2020 to properly assess the cost of the required work. Whilst I accept that this point may have some substance, I would, nevertheless, be of the view that those who provided the respondent's 4 quotes would be in a far better position, having actually gone through and assessed the respondent's home, to come up with some tenable prices than those (on the applicant's side) who do not even have any sense of the dimensions of Mrs U's house.
- 20) Further to the above comparative comment on the respective quotes, Ms V, for the respondent, acknowledges 'knowing' Mr B of B Decorating. Subject to this, the other 3 painters who provided quotes were selected at random. They happened to be available when she needed to organise quotes. Mr O, and Mr L, are, it would appear, painters who live close to the applicant. Mr O, who gave evidence, advised that he is *not* a qualified painter.
- 21) Having considered all the relative evidence placed before me, I consider that the figures advanced by the respondent are more genuinely indicative of the market range of prices for a paint job such as this. Before moving on from this point, I come back to the evidence of Mr O, who was, obviously, called by the applicant to support Mr T's case. Mr O said that the market price range for a paint job such as this would be, in his opinion, \$3,000.00 to \$12-14,000.00. In other words, the applicant's own witness, would appear to acknowledge that a paint job for a 2-bedroom house at a cost of \$3,000.00-plus is at least possible. This is to be contrasted with the applicant's evidence [I here paraphrase] that a job like this would probably cost at least \$12,000.00, plus GST, (\$13,800.00).
- 22) I now move on to consider what the points discussed above will mean for my ultimate ruling in this case. To recap, from the starting point already made about the sanctity and enforceability of contracts, I ask whether the contract term regarding price is 'unconscionable' for the purposes of the Act. I re-state: is the applicant's contract price of \$16,204.00 so far in excess of a reasonable range of price for this job as to be outrageous? In my view, it is. I accept, and uphold, the key point made by the respondent, namely, that the difference of \$10,000.00 between her highest quote and the applicant's quote is so great as to be [I again paraphrase] untenable, and unsustainable. I agree.
- 23) The question of whether a contract term regarding price is 'unconscionable' is fact-specific. As stated, the context, and circumstances of the individual case, have to be considered. As also already stated, this was a consumer transaction, in which there was reliance by the respondent on the applicant, including with respect to costings, and the provision of information about such aspects.
- 24) I am satisfied, and do find, to the required standard of proof, that the contract price of \$16,203.00 is unconscionable. The bar or threshold for such a finding to be made is (because it involves interfering with a contract), necessarily high. I conclude that it is met in this case.
- 25) Where the Tribunal finds that a contract term is unconscionable, it has the power, pursuant to s.19 of the Act, to vary the relative contract. Where this power is exercised, that should be to the extent, but only to the extent, as is necessary to mitigate the unconscionability.
- 26) In this regard, judicial views may vary as to what, in a particular case, is an appropriate variation of a contract term regarding price. Whatever approach is taken will, necessarily be somewhat arbitrary. A broad discretion is given to this Tribunal by my empowering statute.

27) My basic obligation is to determine a dispute that comes before me on the basis of the “substantial merits and justice of the matter, having regard to the relevant law,” [s.18(6) Disputes Tribunal Act 1988]. I conclude (having accepted the respondent’s evidence of relevance with respect to the market price range) that a contract price more than double the average of the respondent’s quotes would be outrageous and, therefore, unconscionable. Twice that average (\$4,710.00) is, approximately, \$9,500.00. I determine that this is, and will be, the extent of the respondent’s liability to the applicant.

28) The respondent has paid the applicant \$4,000.00. She is ordered to pay Mr T a further \$5,500.00.

Referee: G.P. Rossiter

Date: 13 April 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 20 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 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 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>.