



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 737

APPLICANT **IN**
APPLICANT **KT**
RESPONDENT **D Ltd**

The Tribunal orders:

1. D Ltd is to pay IN and KT \$30,000 on or before 5.00pm on 19 January 2024.

Reasons:

1. In January 2021, IN and KT bought a land and home development package at [Road] in [Area] from B Ltd for over half a million dollars. They hired D Ltd to build their first home on the land, as required by the [Property Developer]. The fixed-price building contract was for \$255,000 including GST.
2. In October 2021, D Ltd's surveyor advised the couple that due to Covid-19 impacts, the contract price was no longer viable and needed to increase. IN and KT accepted a price variation on the condition that no further increases would occur. However, D Ltd cancelled the contract in mid-October, before any deposit was paid. IN and KT claim that there has been a repudiation of contract by D Limited.
3. IN and KT had to hire a new [Building Company], which would cost them \$107,552.20 more than the original fixed price contract they had. They claim \$30,000, reducing their claim to come within the maximum jurisdiction of the Tribunal.
4. The issues to determine are :
 - a) Whether there is a valid cancellation of the building contract?
 - b) If so, is IN and KT entitled to all or any of the \$30,000 that is claimed?

Whether there is a valid cancellation of the building contract?

5. Under the law a contract can be cancelled in certain circumstances. The contract itself may contain specific termination or cancellation provisions, there may have been a misrepresentation or one of the parties may have broken a term of the contract. If these circumstances don't exist then generally a party is not entitled to cancel a contract at will.
6. If a contract has been cancelled wrongfully, then the innocent party may claim damages for the losses caused by the cancellation.

7. The parties agree that there was a signed contract 21 January 2021 and it was for a fixed price of \$255,000 including GST.
8. IN and KT wrote to D Ltd to advise reasons for cancelling the contract. Its reasons were that the contract had *“become non-viable to execute, due to the COVID-driven price increases in the building construction industry”*.
9. D Ltd claim it has a legal right to cancel the contract under clause 9 of the contract, it states:
“ the builder shall not be responsible for any loss or damage caused by...operation of the forces of nature that an experienced contractor could not foresee or reasonably make provision for or insure against. “
10. Mr A of D Ltd claims rising costs from suppliers, spurred by the pandemic, make performing the fixed-price contract infeasible. Additionally, Mr. A noted there were other contributing factors in the decision to cancel the contract, including numerous delays. For example, the settlement of titles was expected to occur in 2022, but did not occur until 2023, which is over two years past the originally agreed upon date.
11. Further, Mr A stated the impact of the price increases which was out of their control meant that there has been a legal frustration of the current contract. Therefore rendering the contract to no longer be viable. He said that the applicants are not alone, as they have had to cancel other clients' contracts for the same reason.
12. I accept that building costs have certainly soared industry-wide since the pandemic. IN and KN showed good faith in offering to accept a price variation, if no further increases followed, however, this was not accepted. Mr A said it was not something they could promise given the current climate.
13. I find that the contract's termination clauses allow cancellation only for default by one party (clauses 43-47). That high bar is not met here. Both parties appear to have acted in good faith under difficult circumstances.
14. Further, I am not persuaded that clause 9's force majeure provision applies nor that there is frustration of contract. Such clauses provide relief when unforeseen events prevent contract fulfilment. But the pandemic's impacts were already widely known when the parties signed their contract in January 2021. As the builder, D Ltd bore responsibility to account for foreseeable industry fluctuations in its fixed pricing or contract language. It cannot now claim hardship from the very uncertainty it should have anticipated.
15. Whilst sympathetic to the builder's position, I must uphold the contract as written. The law requires parties to honour their agreements, come what may. D Ltd fixed price contract carried an implicit risk they would later seek to shift. I therefore cannot find cause to cancel under the contract terms presented.

If so, is IN and KT entitled to all or any of the \$30,000 that is claimed?

16. Where a breach of contract is established, a party is entitled to seek damages. The object is to place the aggrieved party in the position that they would have occupied had the contract been performed as originally agreed.
17. IN and KT had to find a new builder and engaged [Building Company], paying an increase of \$107,552.20 compared to the original price they would have paid with D Ltd. They also supplied evidence in support of the reduction in specifications they have had to concede with the new builder.
18. I am satisfied that the applicants have provided evidence to support the loss they have suffered. I therefore find that D Ltd is to pay IN and KT \$30,000.

Referee: D Alofivae

Date: 20 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>.