(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2023] NZDT 394**

APPLICANT **IN**

APPLICANT **UI**

RESPONDENT **C Ltd**

The Tribunal orders:

1. C Ltd is to pay UI and IN $19,600.00 on or before 6 October 2023.

2. The counterclaim by C Ltd is dismissed.

Reasons:

1. C Ltd built a two tiered retaining wall on the boundary of UI and IN's house. UI and IN say the retaining wall started to show signs of failing some months later. They say that C Ltd came back to try to fix the wall, but the problem persisted. They say they employed another builder to fix the wall and seek an order that C Ltd is liable to pay them $19,600.00 which was the cost of the remedial work.

2. C Ltd have filed a counterclaim. It says that there was an agreement with UI and IN that C Ltd would undertake two years of building work at UI and IN's property, and that UI and IN breached that agreement. C Ltd say it has suffered loss of income as a result which totals around $154,929.93. It also says that it only charged UI and IN $45.00 per hour for the work it did at their house, and that in light of the breach of contract by UI and IN, C Ltd is entitled to charge an additional $20.00 per hour for that work, which is an extra $13,271.00 which UI and IN are liable to pay. C Ltd has reduced the amount of its counterclaim to $30,000.00 to stay within the jurisdictional limit of the Disputes Tribunal.

3. The issues to be resolved are:

    a. Did C Ltd undertake the work on the retaining wall with reasonable care and skill?
    b. If not, what if any remedy is available?
    c. Was there an agreement that C Ltd would work on UI and IN's house for two years?
    d. If so, was the agreement breached by UI and IN?
    e. If so, what if any remedy is available?

Did C Ltd undertake the work on the retaining wall with reasonable care and skill?

4. I find that it is most likely that the work on the retaining wall by C Ltd was not carried out with reasonable care and skill.

5. The Consumer Guarantees Act 1993 (CGA) provides that where services are provided to a consumer there is a guarantee that the work will be carried out with reasonable care and skill. A consumer can be entitled to a remedy under the Act if there is a breach of this guarantee.

6. C Ltd built a retaining wall on the boundary of UI and IN's property. There was a bank between UI and IN's property and their neighbours (the neighbour is above UI and IN). C Ltd dug out the bank in stages and built a two tiered retaining wall. The work was completed in around May 2022. UI and IN paid the amounts invoiced by C Ltd for this work

7. UI and IN say that by the end of 2022 there was an obvious bow in the upper tier of the retaining wall. UI contacted C Ltd about this in early 2023, and in late January 2023 C Ltd came back and did some remedial work on the wall.

8. C Ltd says that it later came back again and did further work on the wall – installing "dead man" bracing to try to ensure that the wall would not move further.

9. UI says that C Ltd only came back once but agrees that C Ltd did the remedial work described above.

10. UI says that by April 2023 it was clear the wall was moving again. He says he contacted another builder, Mr M, for advice about what to do. At around the same time UI contacted C Ltd to let them know he was having further remedial work done on the wall. There was some conversation between UI and C Ltd about a possible contribution by C Ltd to the cost of that work. These discussions were not successful.

11. C Ltd did not go back to the property in April to inspect the further movement that UI had identified. At the hearing C Ltd suggested that the wall did not move further and if it did, that the movement could have been caused by piling work being done on the house rather than by a problem with the wall, because C Ltd said the neighbour's fence on top of the wall was not compromised.

12. At the hearing I spoke to Mr M who did further work on the wall in around May 2023. Mr M said that the wall was clearly bowing and that the neighbour's fence on top of the wall, and a path nearby were both slumping. He said that he consulted an earthworks company, XD Ltd. Mr M said that together he and XD Ltd agreed that the wall needed much deeper piles because it was in a sandy location which meant that movement of the earth was inevitable. He said that he and XD Ltd dug out the earth from behind the walls, pulled them back, added extra boards behind the wall to spread the load, and then added large round posts in front of the walls which were rammed in around 2m below ground to ensure the wall would be stable.

13. I also spoke to C from XD Ltd. He agreed that when he saw the wall it was visibly bowed and there was slumping on the neighbour's property above which was affecting a fence and a concrete path. He said the posts in the wall had not been put in deep enough, and all the boards met behind one post rather than being staggered which meant the load was not adequately spread across the wall.

14. I am satisfied on the basis of the evidence that it is most likely that the retaining wall built by C Ltd was not built with reasonable care and skill, because the posts were not deep enough, and the boards were not staggered. The evidence from the professionals who saw the wall after the remediation attempt by C Ltd was that the wall was failing and that the cause was that the posts were not deep enough, and the boards were not staggered. There is evidence that the neighbour's property above the wall was being affected. There is no evidence that there is any other cause of the problems with the wall.

15. C Ltd suggested that all the work was carried out with UI and IN's agreement, and that it had verbally told them that a more specialised larger company should be used to build the retaining wall

and that an engineer or architect should be involved to ensure it was done properly. It says that UI and IN refused this advice and agreed C Ltd should build the wall instead.

16. UI disputed this. He said that he relied on C Ltd's advice about building the wall. UI said that C Ltd suggested he could get quotes from another builder but did not say that further expert advice might be required.

17. It is not possible to contract out of the CGA where goods and services are provided to a consumer. However, a supplier can limit the scope of its services, and hence its liability under the Act. So if C Ltd made it very clear that they would build a wall to a design that UI and IN specified, but could not guarantee that the wall would be adequate, this might limit C Ltd's liability under the CGA. The best way to do this would be to make the extent of C Ltd's services very clear in writing when the contract was entered into.

18. C Ltd says that it verbally limited the scope of its services in this case. UI and IN disagree. The only evidence on this issue is of a he said/she said nature and so there is not enough evidence to support a finding that that C Ltd limited the scope of its services to UI and IN.

19. Given this, UI and IN were entitled to rely on C Ltd's building expertise in relation to the construction of the wall. If C Ltd had concerns or felt that an engineer or architect should be involved it could not have refused to do the work at all.

20. C Ltd also suggested that it should have been given a second chance to remedy the defects in the wall in April 2023 when it was clear that the first attempt had not succeeded. The CGA provides that where there are defects in services, which can be remedied, the supplier is required to be given an opportunity to remedy the problems. However, the supplier is not required to be given multiple opportunities to remedy a problem. In this case C Ltd was given at least one opportunity. It suggested that it might have been back twice. I consider this was a sufficient opportunity to remedy as required by the CGA.

21. In any event the CGA provides that if the problems are substantial, so that a reasonable consumer fully acquainted with the nature of the problems would not have acquired the service in the first place, then no option to remedy is required to be given. I am satisfied that the problems in this case were substantial.

22. For these reasons I find that there was a failure by C Ltd to provide its building services with reasonable care and skill.

What, if any, remedy is available?

23. I find that C Ltd is liable to pay UI and IN $19,600.00 which was the cost to remedy the defects with the retaining wall.

24. The CGA provides that where there is a breach of the Act in relation to services, the consumer is entitled to a remedy which is a refund of the reduction in value of the work below the price paid.

25. UI and IN say that they paid C Ltd $33,700.00 for the work on the wall. They have provided invoices from C Ltd which support this.

26. UI and IN paid Mr M, the builder who remedied the problems with the wall $20,246.21. This included the charges from XD Ltd who were subcontracted by Mr M in relation to the work. UI and IN have also provided invoices to support this part of the claim.

27. UI and IN say that part of the work done by Mr M and included in the invoices was unrelated to the remedial work on the wall. They say that the amount that related to the wall was $19,600.00.

28. I am satisfied that it is most likely that the cost of remedying the defects in the retaining wall was $19,600.00 and this is the amount that represents the reduction in the value of the work done by C Ltd. For these reasons I find that C Ltd is liable to pay UI and IN $19,600.00

Was there an agreement that C Ltd would work on UI and IN's house for two years?

29. There is not sufficient evidence to prove that there was an agreement that C Ltd would work on UI and IN's house for two years.

30. C Ltd says that it had a verbal agreement with UI and IN to commit to working on renovations at their house for two years. It says that the expected value of this agreement would have been around $200,000.00 to $250,000.00. It says that UI and IN cancelled the agreement and are now liable to pay it damages for the earnings it has lost as a result.

31. C Ltd says that at the start of the relationship with UI and IN, it was told that there was a significant renovation project to be undertaken at UI had IN's house. C Ltd says that there was a verbal agreement that it would commit to work on their renovations for two years. It says that because of this agreement C Ltd told other clients it would not be available until 2024, and it charged UI and IN a rate of $45.00 per hour for the work it did at their house, rather than the usual $65.00 per hour.

32. C Ltd says that after seven months of the two year contract UI and IN told it they would be returning to [country], and would not carry on with the rest of the term of the agreement. C Ltd says this was a breach of the agreement that had been reached verbally.

33. At the hearing UI and IN said that there was never an agreement to commit to two years of work with C Ltd. They said they were planning a large renovation, which they thought would take around two years, and this was discussed with C Ltd, but there was no commitment to use C Ltd for all of that work.

34. C Ltd accepts that there is no written confirmation of the verbal agreement it says it reached with UI and IN. The Building Act 2004 requires that there must be a written contract for residential building work with a value of $30,000 or more (including GST), and the Building (Residential Consumer Rights and Remedies) Regulations 2014 prescribe matters that must be included in every such contract.

35. The lack of a written contract, which was clearly a legal requirement if a contract was entered into, means that the only evidence about whether there was a contract between the parties or not is the differing recollections of C Ltd on one hand and UI and IN on the other. It is for C Ltd to prove that there was a binding commitment by both parties to two years of work on UI and IN's house. There is not enough evidence to support a finding that there was such a contract.

36. For this reason, C Ltd's counterclaim must be dismissed.

37. I note, that even if there had been enough evidence to support a finding that a verbal contract for two years of work existed, it is likely that such a contract would include an implied term that either party could cancel the contract with reasonable notice, and so it is unlikely that a finding could have been made that UI and IN breached the contract.

38. For these reasons the counterclaim by C Ltd is dismissed.

Referee: L Trevelyan
Date: 31 August 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.