



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2023] NZDT 419**

**APPLICANT IT**

**RESPONDENT A Ltd**

**The Tribunal orders:**

The claim is dismissed.

**Reasons:**

1. In March 2022, IT engaged A Ltd to renovate and tidy up his rental property at [Address]. The scope of the work was set out in the work order. The work was expansive covering over 33 items. The internal work included removal of some existing fixtures and fittings and remedial and new works, such as some new flooring and window repairs, and painting. The external work included repairs to the retaining wall, a clean and paint of all external timber, including the carport, 3x decking steps and a general tidy of the grounds.
2. The parties agreed that the initial price was \$75,000.00, with a start date of 2 March 2022 and a completion date of 14 March 2022, so that the property could be put on the market after Easter 2022. IT paid \$67,500.00 comprising a deposit of \$37,500.00 and 2 progress payments of \$15,000.00 each. In August 2022, all the work had not been completed and the company cancelled the contract.
3. IT claims a total of \$17,140.00, which he sought to increase to \$18,641.00 comprising \$15,000.00 to finish the work less \$7,500.00 that was unpaid – a total of \$7657.00; \$1590.00 to replace the dishwasher broken by the company, \$7885.00 for lost rental income, and \$1501.00 for payment to a flooring sub-contractor, who he said the company had not paid and who then threatened to remove flooring.
4. The issues to be determined are:
  - a. What were the terms of the contract and was there any agreed variation?
  - b. Did the company breach the contract?
  - c. If so, what is the remedy?
5. The company representative EB did not attend the continued hearing. The hearing continued in his absence pursuant to s43 of the Disputes Tribunal Act 1988, but I considered the evidence he had presented to date.

**What were the terms of the contract and was there any agreed variation?**

6. The common law of contract applies. For a contract to be enforceable there must be agreed terms. The burden of proof rests on the Applicant to establish his claim on the balance of

probabilities. But where a party then asserts a variation to those agreed terms, the burden of proof rests on that party.

7. There was no dispute about the terms of the contract signed in March, as set out in paragraph 1. However, the company's representative's position is that the following extra work was agreed and that he then charged a reasonable price, whereas IT's position is that they were all included within the scope of the contract:
  - a. To fix the window jamb in the downstairs bedroom (\$880.00);
  - b. Laundry plumbing, namely moving the pipes to under the floor, rather than through the wall (\$1850.00);
  - c. Replace 45 door hinges (\$478.00);
  - d. Replace 3 broken windows (\$727.00);
  - e. Replace the retaining wall post;
  - f. Replace 2 steps (\$1920.00).
  
8. With one exception, being the retaining wall post which I accept falls within item 33 "retaining wall and fence repair", I preferred the company's evidence that the above work was additional and fell outside the scope of the contract. So, I accept that these were variations as IT did not dispute that he agreed to the work, and I also accept it was likely necessary to bring the house up to standard for sale. I say this for reasons which include:
  - a. Window Jamb. IT's position is that not only were the windowsills included but that the company's workers broke the window jamb when replacing the sill. On balance I preferred the company's position that the repair to the window jamb in the downstairs bedroom was outside the scope of the contract, and that it was a variation. I say that as it was not included in the items listed in D 10 for the bedroom, which were confined to the supply and installation of new ceiling lights and to paint the walls and ceilings. Also, I accept that the contract prescribes where a window frame/sill is to be repaired and this is limited to the dining room as set out in I25. On balance, I also preferred the company's position that it was fully rotten, including the studs next to it (vertical full frame), and so that it was agreed it should be repaired. Finally, I saw no evidence that the cost invoiced of \$880.00 was unreasonable and so preferred the company's evidence that it was charged on the basis of the cost for subcontractors labour and materials;
  - b. Installation of 2x new stairs at the bottom of the deck. I accept that in addition to the 3 new stairs to link the levels which were included in the contract at item 6 and 29, that 2 new stairs were built at ground level;
  - c. I accept that the positioning of the pipes to under the floor differed to the original contract specification that was in the wall;
  - d. As there was no mention of replacing door hinges in the contract, I accept these were out of scope and likewise the replacement of 3 windowpanes. I also accept that the evidence showing the cost incurred.
  
9. Consequently on balance, I accept that the company was entitled to both increase the contract price to a reasonable sum to include the extra materials and labour, and also that this would inevitably extend the time frame by a reasonable but limited period.

#### **Did the company breach the terms of the contract**

10. There was no dispute that the work was not completed by the due date, and that it was still incomplete in August. Also, it was not disputed that on 24 August 2023, the company refused to continue with the project, on the basis that it required payment before completing the balance of the work.
  
11. While the company sought to justify delays as resulting from sub-contractor issues, the weather, and IT's delays in making choices, on balance I find that the company repudiated the contract when it refused to complete the agreed work. Also, even accounting for a reasonable extension to include the extra work, I find that the company had breached an essential term of the contract when it had failed to complete the work within a reasonable time frame of the due date of March

14. I say this as accept that contract was clear that IT required the work to be completed by Easter so that he could place it on the market, and I do not accept that weather or IT's decisions impacted to any significant extent and also it is no excuse for a principal contractor to blame its own sub-contractors.

**If so, what is the remedy?**

12. The remedy for a breach of contract is to place the affected party into the position it would have been in had the contract been performed.
13. IT's position is that it cost him \$15,000 to finish the work, less \$7,500.00 which he says he did not pay; \$1590.00 to replace the dishwasher, and \$7885.00 for lost rental income as he says he was unable to sell or rent until he could afford to repair the house, and \$1501.00 that he paid to a flooring sub-contractor who he said had been unpaid and who had threatened to remove flooring.
14. The company's position as recorded in its email to IT of 24 August was that the amount of work incomplete was less than \$3000.00 in value. Also it said that there was \$8,380.00 unpaid from the total price of \$75,880.00 (which included just one variation being the window jamb). It then deducted \$2,400.00 for deck stain and \$700.00 for the dishwasher, so it said that the unpaid balance was \$5280.00.
15. I accept that IT is entitled to recover the cost of a second hand [brand] dishwasher, but on his own evidence he paid \$900.00 two years ago, and so I preferred the company's position that the replacement value was closer to \$700.00.
16. I do not accept that there was any obligation on IT to pay the flooring sub-contractor when that was a contractual matter between the company and the sub-contractor.
17. While IT says it cost \$15,000.00 to finish the work, and produced quotes, he acknowledged at the second hearing that he completed most of the work himself. This included cleaning the house, replacing the rotten decking and painting, purchase of 6 cans of paint at \$178.00 each totalling \$1068.00, and \$200.00 for plumbing repairs. I accept that he is entitled to recover those costs, and on top of the amounts prescribed I award \$2000.00 for his labour.
18. However, on balance, I do not accept that IT is entitled to lost rental income. I say this as I preferred the company's position that his stated intention was to sell, and so it was not reasonably foreseeable that he had any intention to rent. Nor was any evidence provided to show any reduction in the market value of the house arising from the delay.
19. In summary I find that IT suffered a total loss of \$3968.00.
20. I now consider the company's position that any loss should be set off from money owed. On balance, I preferred its position as supported by the progress payments and the limited work that IT identified for completion, that more than 90% of the original scope of work had been completed, when just 90% had been paid. I also accept that it is entitled to set off the value of the work performed as part of the agreed variations as set out in paragraph 7 (excluding the retaining wall post). So, on balance, I accept that this value of work which has been unpaid, entirely set off IT's total loss as set out in paragraph 19, so that no money is owed by the company.
21. Consequently, the claim is dismissed.

**Referee: GM Taylor**  
**Date: 6 September 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>.