



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 507

APPLICANT KD

RESPONDENT QM

The Tribunal orders:

The claim is dismissed.

Reasons:

1. On 18 January 2022, KD filed a claim against U Ltd and B Ltd for alleged defective work B Ltd performed when building a conservatory for KD's father in 2007. During the course of the hearings on the claim, U Ltd was struck out as a party. An order was made on 8 June 2022 that B Ltd was to pay KD \$11,127.50 on or before 30 June 2022. As at the date of this decision, B Ltd is listed on the companies register.
2. B Ltd applied for a rehearing of the claim on the grounds that the cause of action arose in 2008 and, if the director had been aware, he would have advanced the defence that it was outside of the six year limitation period. That application for a rehearing of the claim was declined on 26 September 2022.
3. On 19 June 2023 KD filed this claim in the Tribunal against QM, director of B Ltd, in his personal capacity. She said it is the same claim she brought against B Ltd, but now considered she should have also brought it against the director, as she has been unable to enforce the order against the company.
4. The issue that must first be determined is whether KD can now bring this same claim against QM personally.

Can KD bring a claim that has already been determined against the director in his personal capacity?

5. KD said she had not claimed against QM as she had only recently received legal advice to claim against QM. KD considered the Tribunal should have advised her to make that claim and add him as a respondent party.
6. KD did not provide any evidence that at the time when the contract was made that QM made any representation that he would be personally liable for the work performed. From the decision of 8 June 2022, it was found that the company was liable for the costs KD incurred.

7. KD considered QM was personally liable because of an agreement between B Ltd and U Ltd when it purchased the business on 21 June 2017. Clause 7 of that agreement provided:

“Vendors ongoing liability to customers

The vendor accepts ALL ongoing liability for products, services and workmanship (sold to customers of the business prior to the settlement and possession of the business by the purchaser) in accordance with the terms of sale to said customers of the business. In the event that the vendor does not carry out its obligations forthwith to said customers, the purchaser may – after giving the vendor two working days’ notice – and entirely at its own discretion, render such service as it see fit to meet the vendors obligations. Such costs and expenses accrued shall be recoverable from the vendor and or [QM] and [KM].”

8. The vendor in the agreement is B Ltd. The effect of the clause is that B Ltd remains liable for contracts it entered into before settlement. However, if B Ltd did not carry out its obligations, then U Ltd may give two days’ notice to B Ltd, and might choose to do the work, and if it does, it can recover the costs and expenses it incurred from B Ltd or the directors.
9. U Ltd did look at the issues with the leaking conservatory, but did not give notice to B Ltd to perform the work and did not conduct the repair and has therefore not invoiced B Ltd or QM and KM for any costs. U Ltd did not invoke that clause, which was always at its discretion. As U Ltd purchased the business assets only, KD did not show she had a claim against U Ltd and the referee struck the company out as a respondent party.
10. I am unable to find how clause 7 of the agreement between U Ltd and B Ltd enables KD to bring a claim against QM. Clause 7 gave U Ltd an option of pursuing a claim on behalf of a customer if it considered it was a course of conduct it wished to pursue.
11. As KD has not provided any evidence of a basis on which QM could be held personally liable, her claim must be dismissed.
12. However, if KD had provided evidence that QM had given a personal assurance for the work B Ltd performed, then nevertheless, it was a claim that should have been brought when KD brought her claim in January 2022. It is for the applicant to determine who their claim is against and not for the Tribunal to advise the applicant of her legal position. The Tribunal must remain neutral between the parties and not provide legal advice. An order has now been made and to re-litigate exactly the same issues against the director would be unfairly prolonging the course of the proceedings.
13. Finally, if KD had a cause of action against QM, then it arose when the leak was first discovered, which both parties agree occurred in 2008. The Limitation Act 1950 provides that KD had six years to bring her claim against QM if he failed to comply with a personal undertaking. If KD had provided evidence that QM had assumed personal liability, then I would have decided that she was statute barred from now bringing that claim.

Conclusion

14. As KD had not shown she can bring a claim against QM in his personal capacity, the claim is dismissed.

Referee: Ms Cowie DTR

Date: 9 October 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>.