



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 57

APPLICANT **LD Ltd**

RESPONDENT **SQ Ltd**

The Tribunal orders:

1. LD Ltd's claim for payment of its invoices is dismissed.
2. LD Ltd is to pay the sum of \$4,882.70 to SQ Ltd on or before Friday 10 March 2023.

Reasons:

1. On 31 May 2021, LD Ltd provided SQ Ltd with an estimate of \$30,000.00 for the cost to construct an infinity cove in SQ Ltd's studio. A cost-plus-margin contract was signed on 15 June 2021, though the work had started a few days earlier due to urgency. The work continued until a dispute on 14 July 2021. SQ Ltd paid the first two invoices, but has refused to pay the final two invoices for \$7,089.26 and \$3,945.81.
2. LD Ltd now claims payment of the unpaid invoices, which total \$11,035.07. SQ Ltd counterclaims \$30,000.00, comprising a refund of the \$11,323.85 already paid to LD Ltd, \$4,600.00 for the cost of rent incurred to reserve the studio for the building work, \$7,812.74 for the cost of materials purchased by SQ Ltd for the construction, \$5,340.00 for damage to the floor, and loss of income from not being able to rent out the studio in July and August.
3. The issues to be determined are:
 - a) Did the work meet the contractual standard?
 - b) What sum, if any, is payable between the parties?

Did the work meet the contractual standard?

4. The law of contract allows parties to enter into legally binding agreements. The Consumer Guarantees Act 1993 (CGA), briefly mentioned in submissions, does not apply since construction of an infinity cove is not a service ordinarily acquired for personal, domestic, or household use or consumption. However, the written contract provided that LD Ltd guaranteed all workmanship to "a high and acceptable standard". SQ Ltd claims that the work fell short of that standard and that the result was not fit for the purpose of an infinity cove, which is to provide a seamless background for commercial filming and photography.
5. LD Ltd conceded that there were issues with the plastering, but maintained that its building work was up to standard. LD Ltd submitted that its workers had used their building knowledge and building standards to construct the structure within an existing space while keeping within the estimated budget.

6. LD Ltd's witness OI, who has a business relationship with LD Ltd as a subcontractor, visited the site shortly after work on the project finished. He stated in an April 2021 email to LD Ltd's director CH that, in his professional opinion, the cove was installed and built correctly, but needed further plasterwork and repainting. When contacted during the hearing, OI expressed the view that the framing was structurally sound aside from two small defects on the floor where the curve went up. He said that it probably needed a couple more coats of plaster, and that he noticed a few drops of glue and a couple of nails sticking out. He did not notice any noise, and said he would have commented if the floor had squeaked.
7. SQ Ltd witness BL of BD Ltd expressed a different view. He said that the framing was moving and not attached on one side, and that it could not be fixed by further plastering or by adding more braces. In his view, the structure needed to be removed and totally rebuilt. He also said that the materials used to construct the floor were inadequate, and that it could have been built with the existing floor whether or not the floor was level. I note that BL is the more independent of the two witnesses, his only connection with SQ Ltd being that he had done work on the property for SQ Ltd's landlord.
8. Overall, weighing up the witness evidence, communications between the parties, photographic and other evidence, and the submissions of the parties' representatives, I find it more likely than not that there were structural problems with the infinity cove that could not be remedied by extra plastering. In other words, neither the plastering nor the structural work met the contractual standard.

What sum, if any, is payable between the parties?

9. CCLA s 37 allows a party to cancel a contract where a contractual breach substantially reduces the benefit of the contract to the innocent party. I therefore find that SQ Ltd was entitled to cancel the contract.
10. The effect of cancellation under the CCLA is that neither party is obliged to continue performance of the contract, so SQ Ltd does not have to pay LD Ltd's final invoice for \$3,945.81 issued on 19 July 2021. Cancellation does not result in an automatic refund or discharge debts that have already accrued, so it does not affect SQ Ltd's liability to pay LD Ltd's invoice for \$7,089.26, which was due on 11 July 2021.
11. However, the Tribunal has the power under CCLA s 43 to grant relief such as refunds if it is just and practicable to do so. Relevant factors include the terms of the contract, any expenditure incurred for the purpose of performing the contract, and the value or benefit of any performance. Also, the innocent party is entitled to contractual damages. The normal measure of damages for breach of contract is the amount required to put the innocent party in the same position as if the contract had been performed. However, SQ Ltd did not produce evidence of the cost of rebuilding the cove but instead sought its reliance loss, being the amount required to restore it to its original position.
12. It is apparent from the estimate and the communications between the parties that the contract included some renovation work as well as construction of the cove, and the renovation work was complete or near complete when work stopped. LD Ltd's invoices do not separate out the renovation work from the cove construction work, but the estimate allowed up to \$6,441.15 including GST for "Loft hatch and bathroom carpentry". In the absence of evidence on this point, and bearing in mind that SQ Ltd bears the onus of proving its damages, I have assumed that LD Ltd's invoices included \$6,441.15 for the renovation work. I therefore find that LD Ltd may retain \$6,441.15, but should refund the \$4,882.70 balance of the money received from SQ Ltd, and that SQ Ltd is not liable to pay the invoice for \$7,089.26.
13. I find that SQ Ltd has not proved that it should be reimbursed for direct purchase of materials. Although BL gave evidence that the infinity cove will need to be completely rebuilt, that does not prove that the defective cove has no value, such as if some of the materials can be reused or repurposed. Also, SQ Ltd claim to be reimbursed \$7,812.74 overlooks the fact that at least one of the included invoices (\$298.00 for an attic ladder) appears to relate to the renovation work rather than the cove.

14. I am also unable to find that SQ Ltd should be reimbursed for June and July's rental cost. June and July were part of a 2.5-month rent-free period, so it is actually the monthly Opex that is being claimed. The work only took up part of each of those months, coming to just over a month total, and an unknown amount of that time would have been required anyway for the renovation work.
15. The claim for \$5,340.00 for damage to the floor is unproven, as I did not see any evidence of money being spent on remediation, only of the original expenditure on having the floor painted before LD Ltd's work started. I also find that the evidence regarding income earned in other months was insufficient to prove that the defective work caused loss of income or of any particular contracts.
16. I therefore find that the claim for payment of LD Ltd's invoices must be dismissed, and the sum payable by LD Ltd to SQ Ltd is \$4,882.70.
17. This decision has been delayed by the closure of the [City] District Court building due to damage suffered in a major weather event.

Referee: E Paton-Simpson

Date: 21 February 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 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>.