(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 730

APPLICANT **LL and TM**

RESPONDENT **I Ltd**

SECOND RESPONDENT **TE**

The Tribunal orders:

I Ltd is to pay LL and TM $5,558.31 plus interest of $165.44, a total of $5,723.75, within 28 days.

TE has no liability in this matter, and the claim against him is dismissed.

Reasons

[1] The applicants, LL and TM, claim from I Ltd, represented by director TE, and TE, the sum of $19,169.52. The applicants say that I Ltd breached a contract under which I Ltd was obliged to remove and reinstall a house for them, and also caused them loss by making unjustified financial demands. I Ltd and TE deny liability.

[2] The applicants set out their case in writing, in a detailed way. In summary, they said that they had arranged in an oral agreement with I Ltd for the uplifting of a house that they had bought in [city] to a site in [town]. It was agreed that the contract price would cover all the cost of uplifting the house, moving it to [town], securing it pending the obtaining of a building consent and the construction of piles, and the lowering of it onto the piles. At the time the house was uplifted and transported, the applicants had not obtained a building consent and piles had not been constructed for the house, as TE knew.

[3] I Ltd uplifted the house from [city] and transported it to [town] on 29 – 30 June 2022. It was lowered onto blocks, pending the issue of a building consent and construction of piles. It was arranged that the piles would be constructed by EI, who co-operated on projects with I Ltd on occasions.

[4] In late July, TE sent the applicants an invoice for $75,900.00. LL and TE then discussed the price in a telephone conversation, and TE sent a subsequent email to LL, which said:

> As per our telephone conversation, this is my full and final invoice for my services, and includes the jacking down of your house into its new piles at no extra cost to you, once you are ready.

The applicants paid $75,900.00 in full on 15 August 2022.

[5] The required building consent was issued on 1 December 2022. I Ltd raised the house onto metal stands on 1 and 2 February 2023, to enable the piles to be placed. It was found a few days later that EI's intended method of placing the piles was inconsistent with the plan that had been approved by the City Council, and amended drawings had to be submitted to the Council. A further delay was caused by miscommunication between EI and the applicants' architect, and the time taken by the Council to approve the amended drawings. EI was slow to carry out the piling work, and the weather was poor.

[6] On 6 April 2023 the applicants were, they said, surprised to receive an invoice from I Ltd, requesting payment of $3,450.00 + GST as a rental fee for the metal stands upon which the house had been standing. The period of rental stated was 1 February to 31 March 2023. The applicants refused to pay this sum. Their view was that they had not been told of any such payment being required, and the sum that they had already paid had been expressed to cover the total costs of the house removal and restatement on its new site.

[7] On or before 24 April, EI told the applicants that the piling work would be finished on 27 April, and that the house could then be placed on the new piles. EI said that he had arranged with TE that the house would be lowered onto the piles by I Ltd on 28 April. However, I Ltd did not come to the site and lower the house on that date as the applicants had expected. After making enquiries, it became apparent that TE did not intend to do the work until the $3,450.00 invoice was paid.

[8] The parties' relationship soured and, said the applicants, TE had proved incommunicative. Eventually, the applicants had the house lowered on 9 August 2023 by another removal company at a cost of $3,800.00. The applicants said that they had not simply paid I Ltd's invoice at the time to get I Ltd to lower the house because they had lost confidence in I Ltd by this time, and feared that damage might be done to their house if I Ltd did the work.

[9] The applicants' claim was that I Ltd had not been entitled to refuse to lower their house on 28 April. Even if I Ltd's demand for an additional payment had been justified, which they did not accept, they considered that I Ltd should have proceeded to lower the house and then argued about the additional invoiced payment afterwards. They said that they had to pay additional rent of $6566.52, for the period 16 May to 9 August, because of the resulting delay. They also claimed the cost of storage of the household possessions between 29 April to 9 August for the container that they had hired at $50.00 per week. As their rental property was further from [city] than their removed house was, they claimed the additional cost of transport, a total of $820.00, entailed in taking their child to a kindergarten in [city] three times each week. The applicants, would, they said, have spent at least 25% of the additional expense they had incurred by reason of I Ltd's refusal to lower their house on their mortgage, and thereby saved $7,233.00. They sought interest on any sum awarded to them, and compensation for stress.

[10] TE accepted the broad facts of what had happened. However, his defence to the claim was that he had been justified in invoicing the applicants an additional $3,450.00 and, when they did not pay that sum, refusing to lower the house onto the new piles.

[11] TE said that he had been initially aware that the obtaining of the building consent might take some time. He said that the applicants had informed him that the building consent had been issued in December 2022 and he had subsequently gone to the site on 1 and 2 February and placed the house on metal stands to enable the piling work to be done. His expectation was that the piling would have taken 2 – 4 weeks, so that the house could be lowered later in February. However, it proved that there were difficulties with the way the piles were planned, and delays occurred. During the period of those delays, I Ltd's metal stands remained in place under the house, and were not available to be used for other jobs. For that reason, said TE, he had sent an invoice for their use during February and March.

[12] TE agreed that, in hindsight, he should have told the applicants that I Ltd expected payment for the stands if the lowering of the house had to be delayed. In essence, his view was that he had been told that the formalities had been completed so that the house was ready for piling; he had placed the house on metal stands to enable that to happen; delays that were not the fault of I Ltd had occurred; and the stands were left in place longer than they should have been.

[13] TE did not consider that I Ltd was liable for any of the sums claimed by the applicants. He accepted that I Ltd, having not lowered the house, had not completed the job, and he offered the applicants $1,000.00 in compensation for that, which they refused.

[14] TE did not think, when asked, that the best course of action would have been to have lowered the house onto its new piles on 28 April, and dispute the $3,450.00 invoice later. He considered that he had been justified in refusing to lower the house because, in his view, the applicants should have paid the extra sum that he had invoiced.

The issues

[15] I must decide:
- whether the applicants were obliged to pay I Ltd's $3,450.00 invoice; and
- if so, and the applicants not having paid it, whether I Ltd was justified in refusing to lower the house onto its new piles; and
- if I Ltd unjustifiably refused to lower the house, whether any compensation should be paid by I Ltd to the applicants. I must take into account the applicants' own conduct in considering this.

Were the applicants obliged to pay the $3,450 invoice?

[16] In my view, the applicants reasonably denied liability to pay the invoice. TE had not stipulated that there would be a hire charge for the stands and, as he had placed the house on stands at the beginning of February and expected piling to take some 2 – 4 weeks, he would have expected that they would remain in place there until about the end of February. When further delays occurred, he did not inform the applicants that they would be obliged to pay a hire cost for the stands; rather, in early April he simply sent them an invoice.

[17] I consider that the applicants reasonably thought, in those circumstances, that the cost of the stands was entirely within the contract price, particularly as TE had sent them the email cited above in para [4]. Thus, I do not think that I Ltd was entitled to demand payment of the invoice by the applicants.

Was I Ltd justified in refusing to lower the house onto its piles?

[18] I do not think that, whether I Ltd was or was not entitled to charge a hire fee for the piles, it was justified in refusing to lower the house on 28 April. A reasonable course of action, and one that would mitigate any potential losses, would have been for I Ltd to carry out its contractual obligation to lower the house. It could subsequently have disputed the $3,450.00 invoice, and any losses would have been limited to that sum. The hire charge was not part of the parties' contract, and I Ltd's refusal to perform the contract in its entirety because of it was, in my view, unreasonable. Thus, I Ltd is obliged to pay some compensation to the applicants for the resulting losses.

What compensation should be paid by by I Ltd to the applicants?

[19] The applicants are entitled to recover their reasonably foreseeable losses from I Ltd. They were also required to mitigate their losses in a reasonable way. They said that, because of the ill feeling that had developed between them and TE, they had lost confidence in I Ltd and were doubtful whether, even if they paid the invoice, I Ltd would have carried out its obligation to lower the house in a careful manner. I note, however, that LL wrote an email to TE on 15 May 2023, asking: "Would you reconsider lowering the house; we'd like it brought down and for you to have the use of your gear again." TE did not accept this suggestion, and remained incommunicative. On 17 May, LL wrote to TE, saying that the applicants intended to engage an alternative house removal company to lower the house.

[20] Thus, the evidence indicates that the applicants attempted, between 28 April and 17 May, to persuade TE to complete the contract, and TE did not do so. It is clear that, during that period, the parties had reached a stalemate. I consider that TE's failure to engage with the applicants and deal with the applicants in a reasonable way led to the eventual resulting lack of confidence that developed on their part; I also consider that the applicants could have paid the disputed invoice and had the work done immediately by I Ltd. The applicants' emails show that they would have entrusted I Ltd with the

completion work at least until 17 May, and their losses could have thus been limited to $3,450.00 if they had made that payment to I Ltd at some point before that date.

[21] For that reason, I consider that the applicants must share some responsibility for the losses that they suffered. In my view, the applicants and I Ltd are equally responsible for the losses. I have therefore allowed the applicants 50% of the reasonably foreseeable losses that resulted from I Ltd's breach of contract.

[22] I consider the following costs reasonably foreseeable:

The lowering of the house

I Ltd having refused to do it, I consider it clearly foreseeable that the applicants would have to pay the cost of having the house lowered by another company, which was $3,800.00.

Rental

Additional and unexpected rental costs were also reasonably foreseeable. The point of the house removal was to provide a home for the applicants, and I Ltd's refusal to complete the work resulted in a delay in the applicants' ability to move into the house. I accept that the applicants had to pay, because they could not occupy their house, $6,566.62 in rent for alternative accommodation.

Storage

I accept that the applicants could have stored their household and personal effects in the house as soon as it had been placed on its new piles, and the delay meant that that they had to hire a container. Although there was a garage on the property, I accept that it had other items, such as building materials in it, and it could not have accommodated all of the applicants' household property. Their storage container cost, I accept, a total of $750.00.

[23] I do not consider the following costs reasonably foreseeable:

Travel

I do not think that the mileage entailed in an extra ten minutes of travel to [city] was a foreseeable item. The applicants chose, for their own reasons, to take their child to [city] three times each week although they were not living there. I was given no evidence that they informed TE of increased travel costs or the need for them to take their child to [city] regularly. As the applicants were at all times living outside of [city], I do not think that travel costs for that particular reason can be regarded as reasonably foreseeable.

Opportunity to save mortgage interest

I do not regard the applicants' lost opportunity to save mortgage interest as reasonably foreseeable. The applicants had to pay extra for lowering the house, rent and storage, but I do not think it reasonably foreseeable that the sums involved would necessarily have spent on reducing their mortgage. The applicants may or may not have applied the lost expenditure in that way. Reasonable foreseeability must be assessed objectively and, taking an objective view, I do not think that any loss in mortgage interest can be considered reasonably foreseeable. Rather, it is too remote to be recoverable.

[24] Thus, in total, I consider that the applicants have suffered losses of $11,116.62. As I consider, for the reasons stated above, that the applicants must share equal responsibility with I Ltd for their loss, I Ltd must pay them half of that sum, which is $5,558.31.

[25] The applicants are entitled to interest on the sum that I have ordered that I Ltd must pay them. Under the Interest on Money Claims Act 2016, interest on the sum payable from 17 May to 5 December 2023 amounts to $165.44.

[26] I have not allowed the applicants' claim for compensation for stress. Damages for stress are unusual, and not justified in this case. Again, the applicants could have mitigated their losses in this respect.

[27] The applicants have claimed against both I Ltd and TE. However, as their contract was with I Ltd, and I Ltd was in breach of its contract, I do not consider that TE has any personal liability in this matter.

Referee: C Hawes

Date: 7 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.