



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2019] NZDT 1376

APPLICANT MD

RESPONDENT BL

The Tribunal orders:

1. MD is to pay to BL the sum of \$1,471.50 on or before 30 July 2019, calculated as follows:

Original award to MD	\$4,545.00
Less net award on rehearing	<u>\$3,073.50</u>
Sum to be repaid	\$1,471.50

Reasons

1. BL (t/a [company]) undertook renovation work for MD. The contract was ended by MD when she became frustrated with delays.
2. After the contract ended, MD filed a claim seeking compensation of \$5,545.00 for remedial and transition work undertaken by the new builder.
3. At an undefended hearing in November 2018, MD was awarded \$4,545.00. BL had not received the notice of hearing, and only became aware of the order when a bailiff came to seize his ute. He paid the sum ordered to avoid enforcement and filed a rehearing application. He also filed a counterclaim seeking the sum of \$1,170.00 that remains unpaid from the work he completed.
4. The issues to be resolved are: (a) Was BL in breach of the CGA for the time taken to attend to the work? (b) If so, was that breach substantial? (c) Was there any defect in the work done? (d) In light of these findings, does MD need to repay any of the original sum ordered?

Was BL in breach of the CGA for the time taken to attend to the work?

5. I find that BL was in breach of the CGA for the time taken to attend to the work.
6. In the absence of any contracted timeframe, a customer can expect work to be completed under the CGA within a reasonable time.
7. MD originally engaged BL to do the work in October 2017. The work was to begin with a downstairs bedroom and bathroom. As the building consent was not issued until 7 December 2019, nothing turns on the delay between October and December. The bathroom was stripped out in preparation. However, once work began, little progress was made over Christmas and into the New Year. In mid-January, MD asked for an update on expected timing for the work, making it clear that timing was important, but there was no direct response to this. By mid-February, there

had been only 7 days of work done, and whilst the Council had signed off on a pre-line and plumbing inspection, the gibbing had only just begun. After a further three weeks of no progress at the property, MD asked for confirmation that work would progress the following week and threatened a penalty payment clause. Whilst none could have been applied in the absence of a contract, this indicated to BL that MD was concerned about the lack of progress. BL suggested MD find another builder. MD took up this suggestion and advised BL on 9 March that she had done so.

8. Given that the work involved completing a stripped-out family bathroom, the lack of progress over 3 months was unsatisfactory, and a breach of the customer's right to have work completed within a reasonable time.
9. I have had regard to BL's evidence that he clearly advised MD at the start that he was fitting this job in around other work that would take priority. Whilst this may have been the case, I was unable to make a finding on the evidence presented. There was no email or text outlining this condition, and MD disputed that this had ever been explained.
10. I have also had regard to the Christmas period, which intervened at the start of the work. It is notoriously difficult to get workers and subcontractors over December and early January, but the lack of progress in the weeks that followed could not be attributed to this. I am therefore satisfied that the extent of the delay was a breach of the responsibility to provide the service within a reasonable time.

If so, was that breach substantial?

11. I find that the extent of the delay resulted in a substantial breach, thus enabling MD to cancel, and obtain compensation for any loss.
12. The work required a strip and refit of a bathroom, and this room (and other bedrooms) were unusable once the work began. Work of this nature causes substantial disruption to the use of a house. Whilst inconvenience cannot be avoided, there is an expectation that work will proceed in a reasonable timeframe so that the disruption is minimised. If work cannot proceed on that basis, then this needs to be made clear, and in writing, so there is no confusion, and so there a record of the discussion.
13. A breach is considered substantial in the CGA if a reasonable consumer would not have proceeded with the work had they known about the extent of the issue (s36).
14. I am satisfied that MD acted reasonably to cancel out of her frustration at the delays, and that she would not have hired BL had she known what would ensue. In fact, it was BL who reasonably suggested that she cancel once he was aware of their difference expectations on timeframe.

Was there any defect in the work done?

15. I find that there were defects in the bathroom work that had arisen prior to the cancellation of the contract.
16. It was established from the evidence of Mr T, the builder who took over the work, that bathroom walls were not plumb. The gib had to be removed, and the walls packed out to provide an adequate surface for tiles and installation of the shower. The ceiling was also not level. Timber blocking was missing in places for fixture fittings. External weatherboards had to be removed and straightened. A box window needed to be refitted.
17. Other workmanship defects were alleged but were not able to be proved. For example, a claim was made for missing wiring, but the electrician attended and had photographs to establish it was installed. The gibbing over of non-standard wiring connections in the bedroom was not proved to be a fault, as this wiring was not undertaken by BL or his contractors. Other work listed as a defect was in fact simply work that was not finished, which included completion of work around a cavity slider, one wall in the bathroom, and completion of other gibbing.

18. The builder who took over was concerned about the piping in the bathroom. He was not prepared to put his name to that work, and had all the plumbing work redone, at a cost of \$2,070.00. It was not established that the plumbing work was faulty or sub-code. The work had passed a pre-line inspection, and the plumber who did the work attended to stand by the quality of the materials used. Given the dispute over the quality issues, no finding could be made that the plumbing work itself was defective.

Does MD need to repay any of the original sum owed?

19. The original sum awarded was made up of five days of building work, plus electrical and plumbing work, less \$1,170.00 owed to BL for work completed (\$4,545.00). However, this needs to be adjusted in light of the issues that were not proved in a defended hearing to be defective or related to transition costs.

20. As BL has been found to have been substantially in breach for the time taken to undertake the work, this entitled MD to hire a new builder to take over the job, and re-do any work that was defective, without giving BL the opportunity to do it. In addition, it is reasonably foreseeable as liable to result from having to hire a new builder to take on a partly finished job that there are transition costs. These costs include the time taken for the new builder to assess what has been done to date, which may involve removing part of the work to check what is underneath. A new builder ends up effectively warranting previous work, and there is a reluctance for builders to complete the work of others. It is reasonable to allow for the time and cost of attending to due diligence in this process.

21. Based on the information provided in the hearings, I am satisfied that the remedial work referred to in paragraph 16 would have taken 2.5 days out of the 5 charged, with the inspection work prior to this starting being a further day. Approximately 3.5 days out of the 5 is therefore awarded (\$2,173.50).

22. However, the electrical work could not be awarded, as there was a lack of evidence of fault with this.

23. The most difficult issue to consider was whether the plumbing work could be awarded based on a difference of professional opinion as to its suitability for use. The cost to re-pipe the bathroom (\$2,070.00) could not be awarded as defective work. It could only be awarded if it was viewed as a reasonably incurred transitional cost from having to hire another builder who was reluctant to warrant work that used different products.

24. I am satisfied that this cost was reasonably incurred as a transitional cost from having to find another builder to complete the work and is therefore a cost to be borne by BL as directly arising from the failure to proceed with the job within a reasonable time. MD had waited so long at the property to have the bathroom finished (including having the bathroom stripped out over Christmas, that by the time the contract with BL came to an end, it was an urgent and difficult matter to find another builder to take over. The new builder was acting reasonably to require a re-plumb as a condition of his involvement given the legal risks associated with taking over a job, and in the circumstances, this is not a cost MD should have to bear. This was a reasonable transitional cost incurred as a direct result of the failure to proceed with the job within a reasonable time.

Conclusion

25. Consequently, the sum awarded in compensation to MD is \$4,243.50 (\$2173.50 plus \$2,070.00). Deducting from this the \$1,170.00 owed to BL, the net award is \$3,073.50. MD has already received \$4,545.00.

26. This order therefore results in MD repaying \$1,471.50.

Referee:

J Robertshawe

Date:

1 July 2019



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 or a mistake was made.

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 28 days of the decision having been made. If you are outside of time, 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.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 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, and 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>.