(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 687

APPLICANT **MK & NK**

RESPONDENT **B Ltd**

The Tribunal orders:

B Ltd is to pay $1748.00 to MK and NK on or before 31 January 2024 and the balance of the claim is dismissed.

Reasons

1. In May 2022, MK and NK engaged B Ltd to re-roof their commercially-tenanted house in [Suburb]. MK and NK accepted B Ltd's written quotation for $27,807.00 for removing existing concrete roof tiles and supplying and installing a new metal tile roof with associated works. MK and NK paid a 30% deposit as per the terms and conditions. The job was booked for October 2022.

2. MK and NK next paid the 40% material order payment prior to the scheduled installation dates in October. However, those dates had to be rescheduled due to bad weather at the time. The job was re-booked and there followed several more rescheduling for various reasons, such as further bad weather (including the January/February 2023 floods and cyclone), B Ltd's holiday closure and the MK and NK's holiday absence. The work was eventually booked for early April 2023 and materials delivered to site.

3. On the first day of work, B Ltd discovered that tenants of the building including an osteopath and midwife practice were still working and had clients coming and going from the building. They contacted MK and NK and said that work could not proceed with people in the building because removal of concrete roof tiles was a safety hazard.

4. This is the key issue in dispute, with B Ltd saying it had been made clear in phone conversations to NK that the building needed to be empty when the work occurred and that he understood this because there was always a requirement for advance notice of dates so that his tenants could be notified. NK denies that he was told the building had to be empty and says if this were so, it should have been written on the quotation at the outset and he would not have proceeded with B Ltd. He says that his osteopath tenant required notice of the work because he did not want to be present when the roof work was underway and that is why they needed notice of dates from B Ltd.

5. NK told B Ltd on the first day of work in April that he was not going to require his tenants to vacate the building and B Ltd advised that they would not carry out the work on that basis. NK asked B Ltd to provide additional protection so that work could proceed with people inside the building and/or to work on weekend days when the building was empty and B Ltd said that was not possible.

6. NK therefore requested a refund of the $21,614.16 paid and B Ltd refunded $19,866.16, deducting $1449.00 for the edge protection equipment and labour that had been installed and then dismantled when the work did not proceed in April, and $299.00 for the freight charge for returning all materials to the supplier (the supplier accepted return of all materials with no re-stocking fee charged).

7. MK and NK have subsequently contracted another roofing contractor — it transpired at the final hearing that the subsequent roof replacement job was of a different scope, with a Coloursteel roof being installed rather than metal tile. MK and NK claim from B Ltd the difference in the contract prices, being $13,708.00 plus the remainder of the amount paid to B Ltd, being $1748.00, for a total claim of $15,456.00.

8. The issues to be determined are:

    - Had B Ltd communicated to MK and NK that the building had to be vacant in order for the roofing work to proceed?
    - Were MK and NK justified in cancelling the contract?
    - Is B Ltd liable to pay the damages claimed?

Had B Ltd communicated to MK and NK that the building had to be vacant in order for the roofing work to proceed?

9. B Ltd contend that this was discussed with NK on telephone calls on more than one occasion and they thought that NK had understood the requirement because he stated notice would be needed of intended work dates so he could pass those on to his tenants in plenty of time.

10. NK denies that he was ever told that the building would need to be vacant and points out that it is not written on the quotation nor is there any evidence of such a requirement in writing in any form — some of the communication between the parties was by phone and some was by email — I accept that none of the email communication makes reference to the building needing to be empty while work is proceeding. One of his tenants has written a letter saying that in his brief conversations with B Ltd's workers, no mention was made to him that he would not be able to work in the building while the re-roof was underway. That of course does not mean B Ltd did not discuss that with the MK and NK's but it does mean there is no positive proof from that quarter that it was known that the tenant's had to leave during the job.

11. I find it easy to accept B Ltd's position from a health and safety point of view, particularly given that the roof being removed was made of concrete tiles, with the inherent risk and danger of heavy tiles falling into the internal space of the building in the process of being removed. I would have thought that the building being vacant during the job was almost so obvious a requirement that it went without saying.

12. However, NK is quite correct that B Ltd cannot prove that they communicated this requirement to him because nothing was put in writing. It would be good practice in the future to record such a requirement on the written quotation so that there is no dispute about it.

Were MK and NK justified in cancelling the contract?

13. I find that MK and NK were entitled to cancel the contract because, based on their submissions, they were not aware of B Ltd's requirement that the building needed to be empty for the work to proceed. They were not in a position to arrange this with their clients at short notice, and did not wish to agree to such a condition, and so I accept that it was appropriate that the contract came to an end.

14. However I am not making a positive finding that B Ltd did not tell them this, simply that it cannot be established that they were told. It is possible that parties were talking at cross-purposes from the beginning with B Ltd thinking NK had understood their requirement but NK talking only about notice because one of his tenants *preferred* not to be there when work was happening (as stated by his tenant in writing). Consequently, I find that the contract came to an end through mutual agreement rather than as a result of a breach on the part of one side or the other.

Is B Ltd liable to pay the damages claimed?

15. I find that B Ltd should bear the costs of the scaffolding and freight because the onus was on them to make relevant requirements sufficiently clear to their customer. The remaining balance of $1748.00 is therefore to be refunded to MK and NK.

16. However, the difference in contract price claimed by MK and NK is not established, because they have not provided evidence of the cost of the actual roof replacement that was subsequently carried out by a different roofing company. They provided a quotation of $41,515.00 for a metal tile roof (the same type of roof as B Ltd had quoted) but that is not what was actually put onto the building, rather a Colorsteel roof was installed (this only came to light at the final hearing because Mr I from B Ltd had noticed the new roof when he visited a tenant at the property recently). At the final hearing NK says the actual (Colorsteel) roof also cost $41,000 but that he could not provide that evidence because the Tribunal only provides for a certain number of documents to be sent.

17. Even if that were the case (which it is not, because evidence is routinely emailed to the Tribunal after the initial lodging of a claim, and indeed the adjournment order sent after the first hearing, lays out the process for sending further evidence), the difference in contract price is the major part of MK and NK's claim, so the actual price paid for the roof that was installed should have been prioritised as key evidence. Rather they have claimed the difference between B Ltd's quotation and a quotation for a roof that they did not go ahead and have installed.

18. In any event, no actual breach has been established on the part of B Ltd, who were still willing to proceed with the contract, but with a health and safety requirement that MK and NK did not wish to agree to. In these circumstances I would not have considered it appropriate to award any difference in the contract price even if a like-for-like roof had subsequently been installed.

Referee Perfect
Date: 21 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.