



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 314

APPLICANT **N Ltd**
(Counterclaim
Respondent)

RESPONDENT **SQ**
(Counterclaim
Applicant)

SECOND **TQ**
RESPONDENT
(Counterclaim
Applicant)

The Tribunal orders:

1. N Ltd is to pay to SQ and TQ the sum of \$5,863.31 on or before 16 August 2023.
2. The claim by N Ltd is dismissed.

Reasons:

1. In 2021, N Ltd was asked to, and provided, a quote to SQ and TQ (“the respondents”) for architectural concept and building consent services for a proposed new build in [Town].
2. From June 2021 up to September 2022, N Ltd did work on the project. The respondents paid various invoices issued by N Ltd during that time. The respondents cancelled the contract in September 2022.
3. N Ltd sent the respondents an invoice dated 4 July 2022 for \$10,151.63 and an invoice dated 5 October 2022 for \$7,782.91. Those invoices have not been paid.
4. N Ltd is seeking \$17,934.54 which it says it is entitled to is for work done on the project which has not been paid for and some interest.
5. The respondents filed a counterclaim for \$24,263.71. They dispute that they are liable for the amount sought by N Ltd and are seeking a refund of all money paid to N Ltd in respect of the project which was \$24,263.71. They also claimed they should get interest at the same rate that N Ltd was claiming, although that amount was not quantified.
6. The issues the Tribunal has to consider are:

- a. What was the agreement between the parties as to what work N Ltd was to do and how it was to be charged for?
- b. Did N Ltd breach the contract and/ or the Consumer Guarantees Act 1993 (“CGA”) by failing to carry out its work as agreed and with reasonable care and skill?
- c. Did N Ltd breach the Fair Trading Act 1986 (“FTA”) when providing the respondent with a price for this project?
- d. Were the respondents entitled to cancel the contract when they did?
- e. Is either party entitled to the amount sought?

What was the agreement between the parties as to what work N Ltd was to do and how it was to be charged for?

7. A contract may be defined as a legally binding agreement or a promise or set of promises between two or more parties that the law will enforce.
8. N Ltd provided the respondents with a price for its work on this project on 1 June 2021. The document was entitled “*quote*” and was for \$28,750.00 inclusive of GST. There were terms and conditions attached to this “*quote*”.
9. The respondents say that N Ltd was bound to complete the work on their project for the quoted price. They accepted that if there were changes or variations to the design, they may be charged for that in accordance with the terms and conditions dealing with “*additional services.*” The respondents did not accept that clause 3 of the terms and conditions allowed N Ltd to exceed the quoted amount by up to 20%. They said the meaning of the contract meant that there could be up to 20% additional fees by way of additional services. They believed the core services had to be completed for the quoted amount of \$28,750.00 inclusive of GST.
10. An estimate is different from a quote. A quote is a firm offer to provide certain services for a fixed price. An estimate is less certain. With an estimate the actual price charged is calculated in accordance with the amount of time actually required to undertake the work. While the actual price may be based on time, it cannot depart wholly from the original estimate. Estimates are required to be a genuine pre-estimate of the likely costs based on the estimator’s skill and experience. In practice, this typically means that the final cost would not be expected to vary from the initial estimate by more than 20 per cent.
11. I find that it is more likely than not that the figure provided by N Ltd was an estimate rather than a quote. That is because despite the use of the word “*quote*” on the heading of the document, the terms and conditions set out at clause 3 that “*although every care has been taken in the preparation of this proposal it is not possible to predict with complete certainty the cost and timescale of any architectural project. The client should allow at least a 20% difference on costs and timescales.*”.
12. Additional services are dealt under clause 4 of the contract. I do not accept that additional services could be limited to a 20% price difference as the cost of those would be dependent on what changes or variations occurred throughout the project. If a client completely changed their brief after work had been done, it would not be correct to hold N Ltd to the proposed fee plus 20%.
13. I find it more likely than not that the parties agreed that N Ltd would charge no more than \$28,750.00 plus 20% for the core services detailed in the “*quote*”. Additional services were to be charged at an hourly rate. That is what is set out in clause 4 of the terms and conditions.
14. N Ltd accepted there was a conflict in its own documentation regarding the hourly rate. The terms and conditions states that the hourly rate for additional services was stated to be \$90.00 per hour. The quote refers to “*any other agreed work over frame of this quote – all @110NZD / h.*”

15. However, clause 4 of the contract also states that “*all additional services shall be approved by the Client and N Ltd in writing prior to proceeding*”
16. The agreement was that the core services would be completed for no more than 20% over the given cost of \$28,750.00. That means N Ltd could charge no more than \$34,500.00 inclusive of GST for the core services.
17. Additional services could be charged at an hourly rate upon written approval prior to proceeding.

Did N Ltd breach the contract and/ or the CGA by failing to carry out its work as agreed and with reasonable care and skill?

18. Where one party does not do what it has agreed to do under the contract, it can be in breach of the contract.
19. Section 28 of the CGA means that where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill. The standard is that of a competent person exercising the trade in question. If services are not carried out with reasonable care and skill, the supplier is in breach of the CGA.
20. I am satisfied that N Ltd is in breach of the contract by not completing the work as agreed within the price as agreed.
21. N Ltd was obliged under the contract to complete the core services for no more than \$34,500.00 inclusive of GST. That is the estimated figure of \$28,750.00 plus 20% as per clause 3 of the terms and conditions.
22. N Ltd has been paid a total of \$24,263.31 to date by the respondents. Two further invoices were sent to the respondents for \$17,934.54. I will remove the interest component from Invoice #1233. (The issue of interest will be dealt with separately). This leaves the further amount billed by N Ltd for work done as \$16,919.38.
23. That would bring N Ltd’s total amount billed to \$41,182.69. That is \$6,682.69 over what it was entitled to bill for this work.
24. During the hearing, the question of what was charged as additional services was discussed. While there was a dispute about whether these could be charged or not, N Ltd said that the additional services were as follows –

Invoice #1073 - Tech -Structural Engineering	\$ 293.34
Tech Design Changes, RFI, etc	\$ 137.50
Invoice #1163 - Design Changes	\$2,585.00
Invoice # 1233 - Structural Engineering	\$1,595.00
<u>Design Changes -post approval</u>	<u>\$3,135.00</u>
Total	\$7,745.84
<u>Plus GST @ 15%</u>	<u>\$1,161.88</u>
Total inclusive of GST	\$8,907.72

25. N Ltd have charged a total of \$8,907.72 as additional services. Taking that amount off the total amount billed by N Ltd, that leaves a balance charged by N Ltd for core services of \$32,274.97.
26. As N Ltd could charge no more than \$34,500.00 inclusive of GST for the core services and had already charged \$32,274.97 inclusive of GST for core services, it would have had to complete the remaining work for no more than \$2,225.03.
27. N Ltd had provided the respondents with a figure to complete the work which was \$5,920.20 inclusive of GST. That price included a discount of 40% by N Ltd as a “*gesture of goodwill*”.
28. The figures given by N Ltd to the respondents mean that N Ltd was not going to be able to fulfil its obligations under the contract as it was not going to be able to complete the core services for the agreed price, even with the allowance for an additional 20%.
29. N Ltd was in breach of the contract.
30. N Ltd was also in breach of the CGA. The Tribunal heard evidence from some of the other professionals working on this project.
31. QW was the engineer engaged by the respondents to work on this project. He said that while the drawings done by N Ltd were well drafted, he could not send his details to N Ltd and be confident that it had been incorporated by N Ltd into the project as a whole. He said every detail had to be double checked by him. Detailing was often done in isolation, and it was then difficult to bring the whole project together. He gave an example of issues arising with the fascia board. QW did not accept that the initial absence of the truss design would have affected that.
32. The Tribunal also heard from BD, the licensed building practitioner engaged by the respondents. BD described MC of N Ltd as very creative, and he did good 3-D renders. He said during the first six months of the project, there were no issues and N Ltd was very responsive. However, he said MC was away a lot and BD’s opinion was that N Ltd’s staff’s skill set wasn’t up to scratch. He did not believe the staff member working on the project fully understood the building code and he had to spend a lot of time, including travelling to N Ltd, to meet with her to try to resolve some matters. He said N Ltd has probably spent many hours on the project, but the time was not productive as the staff member was not competent in that area.
33. BD referred to other projects he was working on at the same time with N Ltd and said there were issues on other projects as well. His summary was he felt that N Ltd was way out of its depth. He said N Ltd’s staff member was “*clocking up time going nowhere.*”
34. I accept the evidence of QW and BD that while N Ltd and in particular MC personally had good skills, was creative and could do high quality 3-D renders, N Ltd did not carry out its detailed work in respect of the working drawings with reasonable care and skill. That is because certain work requested by the other professionals working on the project was not completed and those that were, appeared to take longer than that of a competent draughtsperson.
35. For these reasons I find that N Ltd was in breach of the CGA as it did not provide its services with reasonable care and skill.
36. N Ltd was in breach of both the contract and the CGA.

Did N Ltd breach the FTA when providing the respondent with a price for this project?

37. Section 9 of the FTA states that no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
38. Section 13 of the FTA states that no person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services make a false or misleading representation with respect to the price of any goods or services.
39. The respondents claim that N Ltd deliberately underquoted on this project. They referred to an email from MC dated 19 August 2022 in which he stated, *“I know I went in far too low with my original quote and that’s my fault and that due to me being away with family in [International destination] the billing wasn’t communicated as it normally would have been.”*
40. The respondents say this shows that MC always knew that N Ltd would be unable to complete the project for the amount stated on its *“quote”* and that this is in breach of the FTA.
41. I am not satisfied that N Ltd is in breach of the FTA. I accept the explanation given by MC that what he meant was that he had realised at the time of writing the email in August 2022 that he had underquoted for the project. He said that only became apparent as the project developed and he realised a lot more work was required, such as on the hand drawn designs from QW. I do not accept that this was an admission by MC that he had at all times known he had underquoted the project.
42. N Ltd was not in breach of the FTA.

Were the respondents entitled to cancel the contract when they did?

43. A contract cannot be generally cancelled at will. Sometimes the contract itself sets out the circumstances in which the contract can be cancelled. Otherwise, a contract can be cancelled in accordance with the cancellation provisions set out in the Contract and Commercial Law Act 2017. (“CCLA”)
44. N Ltd says that the respondents were not entitled to cancel the contract when they did on 16 September 2022 as at that stage N Ltd was not in breach of the contract and was ready and willing to complete it.
45. I do not accept N Ltd’s submission in that regard. As set out above, N Ltd was obliged to complete the contract in accordance with the agreement between the parties. The terms and conditions states that either party can terminate the agreement with not less than 7 days’ notice should either party *“fail substantially to perform in accordance with the terms of this agreement through no fault of the party initiating the termination.”*
46. I am satisfied that the failure by N Ltd to be able to complete the work for the agreed amount, even including the generous additional 20%, was a substantial failure.
47. I am not satisfied that there was any fault on the part of the respondents which contributed to N Ltd’s failure to perform. Reference was made to geotechnical issues which arose early on in the project. While this may have led to some additional work by N Ltd, I do not accept it led to the failure to complete for the agreed price. N Ltd’s role in relation to the Geotech issues was mainly as an observer and it was only when solutions were provided by other professional did N Ltd have to incorporate them into the overall design. I am satisfied that any additional work in relation to the Geotech issues would have been comfortably done within the additional 20% allowance on top of the quoted amount.
48. I do not accept that the way QW provided his drawings to N Ltd can have contributed to the overall cost exceeding the quoted amount. N Ltd would have become aware upon receipt of the

first set of drawings from QW that it was going to have to do the work to turn his hand drawings into digital files. If N Ltd had concerns that this may have increased the costs, this should have been discussed with the respondents immediately. That did not occur.

49. I take into account the evidence of EP who did the original concept design. He said that it was very unfortunate that this situation had arisen, and he believed that better communication could have avoided this.
50. The respondents were entitled to cancel the contract when they did as it was entitled to do so under the contract.
51. I do not intend to go on to consider whether the respondents had a right to cancel under the CGA as they already had a contractual right to cancel.

Is either party entitled to the amount sought?

52. When a contract is cancelled, to the extent that the contract remains unperformed at the time of the cancellation, no party is obliged or entitled to perform it further and to the extent that the contract has been performed at the time of the cancellation, no party is, by reason only of the cancellation, divested of any property transferred or money paid under the contract. (See s42 of the CCLA)
53. N Ltd was not obliged to do any further work on the project once it was cancelled by the respondents on 16 September 2022.
54. However, rights accrued prior to the cancellation can still be enforced. On the face of it that means N Ltd was still entitled to be paid for work done prior to the cancellation of the contract.
55. N Ltd is seeking payment for two invoices in July 2022 and October 2022. Both of those invoices contain claims for additional services.
56. I am not satisfied that N Ltd is entitled to any payment of additional services. That is because the contract states at clause 4 that all additional services shall be approved by the client and N Ltd in writing prior to proceeding. N Ltd accepted at the hearing that did not occur. While some of the variations or changes may have been discussed by email, there was no approval for these and in particular no approval or agreement regarding the costs for these changes or additional services. N Ltd must abide by the terms and conditions set out in its own contract if it wishes to enforce those rights.
57. The respondents disputed the amounts being charged as additional services. It is also likely that some of the design changes, for example in relation to the roof, had not yet been incorporated into the drawing by N Ltd. There was reference to addressing the roof framing in an email from MC on 8 September 2022 but no evidence that the drawings were updated in that regard.
58. For these reasons, I am not satisfied that N Ltd is entitled to the claim for \$2,585.00 plus GST for design changes on invoice #1163. Nor is it entitled to the claim for \$1,595.00 plus GST for structural engineering and the claim for \$3,135.00 plus GST for design changes on invoice # 1233.
59. The respondents were not obliged to pay the amounts set out on invoice #1073 for \$293.43 for structural engineering and \$137.50 plus GST for design changes. That is a total of \$430.93 plus GST that the respondents have paid N Ltd which it was not entitled to as those fees were not agreed in writing prior to proceeding.

60. The calculation as to who is to pay what to whom in this matter is a difficult one. I find it more likely than not that the work done by N Ltd on this project was of some value to the respondents. The calculation of that value was discussed at the hearing and is difficult to assess.
61. I note that MC raised at the last hearing having an independent review of this matter. That was also raised by MC back in December 2022 when the matter was first listed for hearing. He indicated at that stage that he wanted time to organise someone independent to review the file. He did not do so and in my view has had ample time in which to arrange that if he wanted to.
62. MC's view was that the work done by N Ltd was approximately 90% of the work required to get the documents ready for lodgement for building consent. I find this unlikely to be correct in light of the estimate of costs given by N Ltd to complete the project of \$5,920.20 which included a 40% discount. N Ltd was also at that stage still waiting on some significant information from the engineer before being able to complete the drawings to consent standard.
63. BD's view was the work done by N Ltd was approximately between 30% and 40% of the work required to lodge for building consent.
64. I place more weight on the evidence of ND of O Ltd. He was the architectural designer who took over the project after the contract with N Ltd was cancelled. He said that his view was that the work done by N Ltd would have been somewhere between those two extremes of 40% and 90% of the overall work required for the project. He said he was unable to put a figure on it.
65. Under s43 of the CCLA, the Tribunal has the power to grant relief where a contract is cancelled. Section 45 of the CCLA sets out the matters I can have regard to when decided what relief, if any to grant. Those matters include the terms of the contract, the extent to which any party to the contract was or would have been able to perform it in whole or in part, any expenditure incurred by a party in, or for the purpose of, performing the contract, the value, in the Tribunal's opinion, of any work or services performed by a party in, or for the purpose of, performing the contract, any benefit or advantage obtained by a party because of anything done by another party in, or for the purpose of, performing the contract and any other matters that the court thinks proper.
66. MC pointed to a number of similarities between O Ltd's plans and those of N Ltd. SQ said you would expect the plans to be similar as it is the same original concept and design being produced as drawings.
67. I am satisfied that the work done by N Ltd had value and that the respondents obtained a benefit from that work. ND accepted in his evidence that O Ltd did save some time by having access to some of the files from N Ltd, in particular a pdf file that had some measurements and dimensions on it. ND said while he did have the [redacted] file, he did not open it or use it when creating his drawings.
68. EP's opinion was also that the work done by N Ltd was of value to the respondents.
69. I am satisfied that N Ltd is entitled to retain some of what it was paid for the work done for the respondents. It was of value and the respondents obtained some benefit from N Ltd's work. The respondents are not entitled to a full refund of what they have paid N Ltd.
70. I have determined that the best way to calculate payments is based on what the contract between the parties was. The respondents were contractually entitled to have the core services completed for no more than \$34,500.00 inclusive of GST.
71. ND said he quoted the respondents the sum of \$14,000.00 plus GST to complete the project. Some additional costs were incurred as there were some variations and the respondents ended up paying \$18,181.50 to O Ltd. I do not intend to take into account those additional costs as they may have occurred regardless as to who was doing the work.

72. The respondents paid N Ltd a total of \$24,263.31. \$495.57 of that was for unapproved additional services inclusive of GST. I intend to deduct that from the amount paid to N Ltd. That means the respondents paid N Ltd \$23,767.74 for core services.
73. To complete the project, they had to pay N Ltd an additional \$16,100.00 inclusive of GST and leaving aside additional work.
74. The respondents have paid a total of \$39,867.74 inclusive of GST for the core services. They were entitled to have that work completed for \$34,500.00 inclusive of GST. They are entitled to the difference between those two figures as compensation. That is a figure of \$5,367.74.
75. The respondents are also entitled to a refund of the \$495.57 paid to N Ltd for unapproved additional services.
76. N Ltd is not entitled to any further amounts as claimed as it was required to complete the project for an agreed amount and was in breach of the contract by being unable to do so. Some of the amounts claimed were for unapproved additional services and as there was no prior approval in writing they cannot now be claimed. If I was to allow the remaining amounts sought as per the invoices, N Ltd would be getting paid more than it was entitled to under the contract. The amount awarded is equivalent of an acknowledgment that N Ltd had done approximately 53% of the work required for the core services.
77. N Ltd is not entitled to any interest on overdue amounts as those amounts were not payable by the respondents.
78. There was no agreement that interest would be payable by N Ltd in the event it had to refund money to the respondents. The respondents are not entitled to interest on a contractual basis. While I do have the ability to award interest if I think fit, I do not find it is appropriate to award interest to the respondents in this matter. This issue was not pursued strongly at the hearing.
79. N Ltd's claim is dismissed.
80. The overall result is that the respondents are entitled to \$5,863.31 from N Ltd.
81. N Ltd is to pay to the respondents the sum of \$5,863.31 on or before 16 August 2023.

Referee: P Byrne
Date: 25 July 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>.