(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2019] NZDT 1405**

APPLICANT **OF**

RESPONDENT **D Ltd**

The Tribunal orders:

1. OF is to pay to D Ltd the sum of $1,856.19 on or before 31 August 2019.

2. Within five working days of the receipt of those funds, D Ltd is to deliver the Austin Allegro to OF.

Reasons

1. On 22 May 2013, Mr G of D Ltd ("the company") provided OF with an estimate of $16,100.00 to complete an exterior body restoration of an Austin Allegro.

2. By agreement, the work proceeded over a number of years as OF's finances allowed. Over that time, the car remained at the company's premises as a long-term project.

3. However, by the end of 2018, the parties were in dispute over what had been spent. By then, OF had paid $20,905.81, nearly $5,000.00 more than what had been estimated. Mr G had largely completed the restoration. However, the company was seeking a further payment before Mr G released the car. This further payment would bring the total cost of the restoration to $29,546.00. This was over $13,000.00 more than had been estimated.

4. A stalemate ensued. Mr G asserted a repairer's lien over the car, and threatened to sell it. OF sought legal advice, and filed a claim seeking the return of his car, along with a declaration that he was not liable for any further sums. Mr G has retained the car, and seeks the balance of sums owed, plus interest and storage costs ($10,013.38, accruing).

5. The issues to be resolved are:

   (a) Did the company provide a quote or an estimate?

   (b) Was that quote or estimate breached?

   (c) If so, what are the consequences of the breach?

   (d) Is OF entitled to any further deductions?

   (e) Is the company entitled to interest and storage costs or other finishing costs?

Did the company provide a quote or an estimate?

6. OF submitted that the company had provided a quote for the work that could not be exceeded.

7. However, I find that the company provided an estimate for the work, rather than a quote. The cost assessment dated 22 May 2013 is headed up "*Estimate for Austin Allegro*". Whilst the word "*quote*" appears in the body of the document in more than one place, I am satisfied that an objective third party interpreting the document in light of the nature of the work to be undertaken and the introductory wording, would consider the price given to be an estimate only.

8. The subsequent conduct of OF in paying more than the estimated sum without noting his concern at the time supports the conclusion that he also understood the original costing to be an estimate only.

9. OF submitted that he had instructed Mr G in May 2014 to only do enough to obtain a WOF, and therefore that he could not charge for the full restoration that was subsequently undertaken. Whilst there had been an indication, with funds being tight at that time, that OF would only want the car warranted, this indication was never turned into a clear instruction that overrode other body work being done. After that suggestion, OF started making payments again towards the full restoration, and never disputed the rest of the work being undertaken, despite Mr G checking in for further instructions in mid-2015 and mid-2016, clarifying that work was to proceed, and asking OF to come and look at what work was being done.

10. The estimate originally allowed for restoration of the vinyl roof, but this was later changed to a painted roof. Mr G confirmed there would be no change to the price. Consequently, other than an issue with the paint colour in one area that is discussed later, nothing turns on this alteration.

11. Accordingly, the contract was for a full body restoration at an estimated price of $16,100.00.

Was the quote or estimate exceeded?

12. The company has submitted accounts for sums that exceed the estimate by approximately $13,000.00. The original estimate was well under the actual cost.

13. It is accepted that the estimate did not include new parts. This accounts for approximately $853.00 of the extra amounts charged, and OF accepted the cost of removing windscreens in invoice 1641 was also an extra ($184.00). This effectively increases the original estimate to $17,137.00.

14. Mr G submitted that there were also unforeseen additional costs that could not have been determined at the time he assessed the car in 2013. These fell into two main categories.

15. The first was two areas of damage that were not noted when he did his original assessment. One was in the inner structure of the car, and the other was accident damage at the front of the car. These repairs cost approximately $5,500.00. I have had regard to whether these should be viewed as being outside the work covered by the original estimate. However, the estimate was "*To repair bodywork as required*", and it was accepted by Mr G that the contract was for a full exterior restoration. There was no mention in the estimate that it was subject to finding any further hidden damage not visible upon inspection, and it could not now be determined whether this additional work was reasonably discoverable when the car was originally inspected. There was also no advice given at the time the extra damage was discovered to obtain consent to doing further work. Consequently, it cannot be said that the additional work can be charged as an extra. It simply formed part of the work for which the estimate was given.

16. The second category of additional costs arose from extra labour in having to re-do filler, etching and priming from the car remaining in storage for so long whilst the job was being done. Mr G assessed the extra labour required for this as being in the order of $3,000.00. I am satisfied that it was not contemplated at the time of the original estimate that the work would take place over such a long period. On that basis, these are costs that would be viewed as additional to the estimate

(extending the estimate out to $20,137.00), although it is acknowledged (as discussed later) that no mention was made of these additional costs at the time they were incurred.

17. From a purely contractual point of view, allowing for some extras ($4,037.00), it is considered for the above reasons that the estimate was exceeded by $9,409.00, being $29,546.00 less $20,137.00. This was a significant cost overrun.

What are the consequences of the breach?

18. As a consequence of the cost overruns, I find that the company has breached its contractual and statutory obligations to OF.

19. OF decided to proceed with the project on the strength of the estimate. The increasing costs revealed a misrepresentation to which the provisions of s135 of the Contract and Commercial Law Act 2017 apply. By virtue of that Act, where a person is induced to enter into a contract by a misrepresentation, that person can seek damages for their loss, the best measure of which in this case would be the extra that has been charged over and above a reasonable tolerance from the estimate.

20. In addition, Mr G's company was operating "in trade" in supplying services to OF as a car restorer. His work was accordingly subject to the statutory warranties contained in the Consumer Guarantees Act 1993 to provide services with reasonable skill and care (s28), and the obligations set out in the Fair Trading Act 1986 not to mislead (ss9-13).

21. As a rule of thumb, an estimate is considered to have been a misrepresentation if it is between 15 and 25% short of actual cost. Whether or not a discrepancy amounts to a misrepresentation depends very much on the nature of the work being done, the discussions between the parties about what is included, how the job progresses, and the extent of the miscalculation. Given the nature of the work being done in this case, and the extent to which the car was viewed as a long-term project, and given also that payments continued to be made as costs mounted without a close analysis of what was being spent, it is considered that the allowable discrepancy in this case should be at the higher end of this calculation, being 25%.

22. However, in this case, the additional cost (less the allowable extras) was $9,409.00, which is over 50% greater than the original estimate of $16,100.00. I am satisfied that this amounts to a misrepresentation, and breach of the statutory obligations listed above.

23. This error entitles OF to be put in the position he would have been in had the misrepresentation not been made (CCLA), which could similarly be viewed as consequential losses under the CGA and FTA. In this case, damages under either head would be calculated on the same basis.

24. Had the estimate been exceeded, but within reasonable bounds (25%), the excess would have been acceptable as a risk of the estimate. Consequently, the starting point is that the company can charge $20,125.00 (being $16,100.00 x 1.25), plus the allowable extras ($4,037.00), which totals $24,162.00. As $20,905.81 has been paid, this leaves $3,256.19 due.

25. However, other rights of set-off or damages were claimed by both parties that must also be considered.

Is OF entitled to any further deductions?

26. OF presented invoices showing he had incurred legal costs of over $1,000.00. When Mr G threatened to sell the car, he instructed his lawyer to assist in ensuring this did not occur. His lawyers wrote a letter dated 26 March 2019 disputing the right to sell and helped OF to file his Disputes Tribunal claim.

27. A party to Disputes Tribunal proceedings is unable to claim costs associated with the proceedings, which includes legal costs incurred in filing the claim (s43 Disputes Tribunal Act 1988). However, I am satisfied that the earlier part of the legal costs incurred in responding to Mr G's intention to sell

the car was not a cost of the proceedings, but a consequential loss caused by a breach of CGA warranty.

28. It follows from the findings made above that by the time Mr G attempted to exercise his right of sale, he was in breach of his obligations to OF. Not only had he substantially misrepresented the cost of the work, he had failed to keep OF informed as he became aware of cost overruns. Mr G failed to advise that additional costs were being incurred because of the number of years over which the work was done. He also failed to advise that he had found other damage that he had not accounted for in the initial work, and simply went ahead and repaired that damage without getting consent. Towards the end of the work, Mr G again misrepresented the amount of work left to be done, by suggesting that the work was almost complete, before sending another large bill after the meeting. In all of these areas, Mr G failed to manage the services he was supplying with reasonable skill and care. There was accordingly no prospect that he was entitled to the sum he was claiming. His right of sale under his repairer's lien only applied to debts to which he was entitled. Given the dispute, which was known at the time of the threat to sell, the appropriate course of action was to file a claim in the Tribunal.

29. It should also be noted that body work on classic cars almost inevitably results in overcapitalization. The cost of the work done can never be realized on sale. This is particularly so for unusual or quirky cars, such as the Allegro. The parties accepted that the car was not likely to sell for much over $6,000.00. The threat of sale was therefore not only inappropriate in light of the known dispute but was also likely to write off all the work done. As a strategy to resolve a dispute by a service provider who is in breach to his customer that he has led astray, it was untenable.

30. When the threat to sell was made, OF had little option but to seek legal help to stop it. Accordingly, I am satisfied that his legal costs associated with the first letter are recoverable. I have assessed this to be the first part of the legal bill, being rounded to $650.00.

31. It was also established that Mr G had failed to paint the correct colour under and around the windscreens. He indicated a cost of $510 + GST ($586.50). Accepting that there may be some increase in this if done by a third party, and assuming that OF will not want Mr G to do this work, I have made an additional allowance for this, rounded to $750.00.

32. OF made submissions about other matters for which I was unable to make findings. He presented other internet complaints made about Mr G. However, these did not relate to his contract, and I was unable to make inferences from these previous and uncorroborated accounts about what had occurred in this case. OF had also had numerous conversations with Mr G over the years. Findings could not generally be made about what had been said, other than what was accepted, or later recorded in emails. OF also pointed to the notations on invoices, some of which suggested there had been double billing for similar work. OF had been left with the impression by the end that Mr G had used his project as a cash cow without properly accounting for his time, taking advantage of the ongoing and open-ended nature of the work. It was not possible to make findings that items had been double billed, but it was accepted that Mr G had at times not been clear on his invoices about what stage he was at, and how much further there was to go, which added to the confusion at the end.

33. OF submitted that a witness who appeared for Mr G to talk about the likely cost of the work in fact gave evidence that supported OF case. I concur with this. The witness, who was experienced in dealing with car restorations, indicated prior to hearing the total cost that a full body restoration of a car such as the Allegro would take about 6 weeks, which amounts to about $18,000.00. Whilst he made the point that the degree of work depends on each job, and could expand out to $30,000.00, this evidence did not assist Mr G given that Mr G's estimate had been given at the lower end, and no consent had been gained as the job progressed to incorporate the extra work.

34. I have had regard to whether the allowed extra for the resealing of areas due to the time taken on the overall job ($3,000.00) should be brought into account given the lack of discussion about this cost at the time it was incurred. I am satisfied this was a genuine additional cost incurred by the manner in which OF extended the time frame by his financial constraints. Whilst Mr G should have talked earlier to OF about this cost overrun, OF should also have talked to Mr G about the same

issue. OF continued to make payments, which represented to Mr G that onging work would be paid for, notwithstanding the cost overruns. Whilst the service provider remains primarily responsible for managing the communication, OF has contributed by his own acquiescence over such a long period which has created some impression of consent. Accordingly, I consider it reasonable for OF to pay for the additional costs incurred through no fault of Mr G, despite the lack of communication about those, if only to the extent of the $3,000.00 identified.

35. The net effect of these findings is that the sum of $1,856.19 remains due.

Is the company entitled to interest and storage costs or other finishing costs?

36. Mr G presented photos of signs in his business that entitled him to "late payment fees and collection costs". On the strength of these, and other correspondence, Mr G sought interest and storage costs.

37. It follows from the above findings that it would be contrary to legal principle, and to the substantial merits and justice of the case for these to be recoverable.

38. Mr G had always accepted payments over time and had no contract for the recovery of interest. Interest was claimed once the parties fell into dispute, but as there were no signed terms of trade entitling this to be recovered, and the dispute was primarily caused by Mr G's breach, the financial cost of late payment is for Mr G to bear. It is not clear whether the signs were reasonably visible prior to the establishment of the contract, but in any event, Mr G was responsible for the dispute that caused the non-payment.

39. Mr G also sought storage costs, but the same principles apply. OF had offered to store the car if required, and Mr G elected to retain it to take the benefit of his lien. As Mr G's possession of the car arose from his own breaches, there is no basis for requiring OF to pay storage.

Conclusion

40. Consequently, OF is liable to pay $1,856.19, made up as set out below. Upon payment of that sum, the company is to return the car.

Total recoverable	$24,162.00
Less sums paid	$20,905.81
Less legal costs	$650.00
Less repaint costs	$750.00
Balance due:	**$1,856.19**

Referee: **J Robertshawe**

Date: **9 August 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.