



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1320

APPLICANT **OH Limited**

RESPONDENT **NI Limited**

The Tribunal orders:

1. The claim is dismissed.

Reasons

1. OH Limited (OH) supplies and maintains [redacted] automatic door systems to commercial premises, including a number of [redacted] supermarkets. The contracts involve installation of the doors and the payment of an ongoing rental for the period of the contract.
2. Under a contract dated 10 October 2009, OH supplied and maintained doors to [redacted] supermarket [redacted] from 30 May 2010 to 30 May 2020 at a rental of \$64.00 per day (\$23,506.00 per annum). The contract was initially with WT Limited (WT), but its interest was later assigned to a company that took over the supermarket, NI Limited (NI).
3. After the contract ended in May 2020, the doors were removed on 3 July 2020. OH then filed a claim seeking \$6,8883.30. This was made up of \$3,087.15 for maintenance costs incurred after May 2020, plus the cost of removing the doors (\$3,796.15). NI paid for the maintenance costs, which left only the removal costs in dispute.
4. The issues to be resolved are: (a) Which documents formed part of the contract between OH and NI? (b) In what circumstances was OH entitled under that contract to claim removal costs? (c) Are removal costs recoverable?

Which documents formed part of the contract between OH and NI?

5. The contract between OH and NI was recorded by:
 - (a) a short memorandum signed by OH and WT dated 10 October 2009 for the supply of doors "as specified in the attached proposal and offer"; and
 - (b) a signed assignment transferring the obligations of WT to NI dated 20 May 2018.
6. The "proposal and offer" referred to in the original memorandum is not signed. However, OH presented a letter of offer dated 16 September 2009 addressed to [redacted] supermarket [redacted] setting out terms which appeared to relate to the memorandum signed on 10 October 2009. Mr U of OH also presented a document entitled "[NI]: Automatic Entry Performance Agreement Standard Terms and Conditions". He stated that these terms were part of the proposal

to which WT agreed in 2009 and are part of the package agreed with all other supermarkets for which they supply doors.

7. NI states that there is no proof that these additional terms form part of the deal with WT. However, in the absence of evidence to the contrary, I am prepared to accept Mr U's evidence that these are the company's standard terms that are incorporated into the contract. It would be best practice to show signatures attached to them, but the lack of a signed document is not the end of the matter. It does appear as if the proposal letter (which is also unsigned) formed the basis of the arrangement, including the agreed price, and it was in keeping with this informal method of incorporating terms, that the second more complete set of standard terms were also not signed. The letter of offer on its own failed to cover some key aspects of the arrangement, and I consider it unlikely that the parties would proceed without a more complete set of obligations. I would have needed to see evidence from other supermarkets that these terms were not included in other contracts to be satisfied that they had been generated after the fact.

In what circumstances was OH entitled under that contract to claim removal costs?

8. Clause 11.2 entitled OH to claim removal costs if the lease was terminated "*for any reason other than its due fulfilment by [NI]*".
9. Clause 10 of the terms discuss what occurs in the event of a default. Amongst other things, default entitled OH to terminate. In those circumstances, by virtue of clause 11, "due fulfilment" would not have occurred, and removal cost would be chargeable.
10. Clause 12 set out what would occur at the end of the lease. The options were set out to either terminate, start a new agreement for the same doors, or start a new agreement for a new entry system. That clause was silent on creating any obligation on NI to pay for removal if the contract was terminated.
11. Consequently, the contract only required NI to pay for removal where the contract was terminated due to breach by NI.

Are removal costs recoverable?

12. I find that removal costs are not recoverable in this case.
13. The contract came to an end as the fixed term ended.
14. I am therefore satisfied that NI had completed "due fulfilment" of the terms of the lease and could not be asked under clause 11.2 to pay for removal. Clause 12 did not require removal costs to be paid on termination. Options put forward by OH after the lease ended also failed to put NI on notice that it would seek removal costs on termination.
15. I have had regard to the fact that NI stopped paying rent once the lease ended, but still had use and possession of the doors, and also sought maintenance of them during that time. I am satisfied from the timeline of correspondence provided by NI that from early May 2020, NI was considering its position under the contract, and attempting to find out the terms of the arrangement. NI advised on 18 June 2020 that it did not wish to renew. It offered to pay continued rental until the doors were uninstalled (\$2,060.80), but this was not accepted. Instead it paid for the requested maintenance charges (\$3,087.15) which would otherwise have been covered by the rental.
16. Having paid the greater of the outgoings or the rent, I am satisfied that that should be the end of the matter. The contract is silent on how a negotiation period should be viewed. I am satisfied that it should not be viewed as a failure to fulfil obligations for the purposes of clause 11, as the spirit of that clause refers to non-performance of a lease which had ended.
17. In these circumstances, the law would be quick to imply a term into the arrangement that the parties act in good faith to re-negotiate, pay either rental or maintenance, and that OH would use best endeavours to remove the doors in a manner which caused least disruption to the operation

of the supermarket. Such terms would be so obvious they go without saying, necessary to make the arrangement work, and are not in conflict with any written terms. I therefore consider that the goodwill extended by OH to remove the doors in consultation with NI was not something for which they could expect an additional payment, but an obligation arising from its position under the lease, and the rental stream it had received. If OH intended to recover removal costs in this situation, this should be expressly provided for in Clause 12.

18. NI presented an invoice from its lawyer in its evidence showing it had spent \$1,510.40 in legal fees. This sum is not recoverable from OH, as the use of legal services to negotiate a matter is an election that is not a necessary cost associated with the dispute. The matter could have been submitted without incurring this cost to the Disputes Tribunal for resolution. Neither party is able to recover their cost of the proceedings, including the filing fee incurred by OH (s43 Disputes Tribunal Act 1988).

Conclusion

19. It is accepted that the contract between the parties included the standard terms and conditions presented by OH. However, OH was not able to establish that it had a right under those terms to charge NI for the removal of its doors.
20. Consequently, the claim is dismissed.

Referee:

J Robertshawe

Date: 30 September 2020



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 28 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 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, 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>.