



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 405

APPLICANT S Ltd

RESPONDENT D Ltd

The Tribunal orders:

D Ltd is to pay directly to S Ltd the sum of \$3,358 or before 12 September 2023.

Summary of Reasons:

[1] The hearing was convened by teleconference. Both parties appeared at the hearing.

Background

- [2] In early 2021 the applicant engaged the respondent to do extensive renovation work on its commercial property. Part of this work included replacing three upper-level aluminium windows on the northwest wall. The work did not include exterior waterproofing. Both parties agree further external waterproofing was required and expected to be done in the near future. The applicant claims that since this time the windows have leaked.
- [3] On 9 June 2022 the respondent provided a quote for further waterproofing in the amount of \$55,297.26. Due to the Covid restrictions, staff shortages, wet weather and NB, the respondent's director travelling overseas, the additional agreed work was never started, and the contract was terminated with the agreement of both parties. The parties agreed the applicant would obtain further waterproofing services from another supplier.
- [4] On September 2022 the applicant engaged O Ltd to inspect the property. The report records high moisture readings, water tracking and identifies the aluminium windows as poorly set into the block and *will require removal and professional reinstating*. The report also records some effervescence on the block work, that the *waterproof coating on the outer face of the block wall has deteriorated and only installed down to the timber batten on the base of the building*. O Ltd recommended waterproofing channelling and ground clearance.
- [5] In late December 2022 P Ltd completed waterproofing and remediation work invoiced at \$19,609.50 for the outside work plus \$8,260 for repair to internal water damage. This work did not include the removal and reinstallation of the aluminium windows but did include additional flashings and sealing around the windows. The applicant concluded that \$14,950 of this work was only required because the respondent failed to adequately waterproof the installed windows.
- [6] On 24 April 2023 the applicant filed this claim in the Tribunal seeking \$14,950. In support of this claim the applicant has provided the O Ltd's inspection report, two invoices from P Ltd and the witness evidence of OB of P Ltd.

- [7] The respondent denies liability stating it advised the applicant at the time of window insulation that further waterproofing would be required as evidenced by its quote for a further \$55,000 to weather tight the building. NB refers to evidence of long-standing water egress and cracks above the installed windows as well as along the entire block work. The respondent notes that whereas the inspection report advised removal and reinstallation of the window frames the applicant merely replaced flashing and resealed around the frame. The respondent also claims it is being asked to pay far too much as P Ltd completed far more work than simply sealing around the windows.

Issues

- i) Are the aluminium windows leaking.
- ii) Did the respondent advise the applicant that cracks around the windows must also be waterproofed to avoid further water egress from this area.
- iii) What amount of the invoices provided relate to the respondent's work.
- iv) Is the applicant is entitled to any compensation.

Issue 1

- [8] I accept the applicant's evidence that the windows continued to leak after insulation in 2021. The evidence is less clear on the extent of this leaking. The applicant claims there was sufficient leaking immediately after the windows were installed to cause great inconvenience to its tenants and damage to the interior of the property. The respondent admits some leaking but claims a large part of this comes from cracks in the block work particularly above the window and also claims the applicant is exaggerating the water egress and minimising the effect of extreme weather events particularly around March 2022.
- [9] The applicant has not provided much evidence supporting its claim on the extent of the leaks but relies on the temporal connection, the inspection report and OB's evidence as well as reports of conversations with its tenants. The inspection report refers to water egress but also states this can only be remedied by removing and reinstalling the windows. The applicant did not remove and reinstate the windows and claims the leaking has now stopped, calling the inspection report into question. OB's evidence is that the windows were installed correctly, the only problem being the flashing and sealing, and whereas there was some water egress around the unsealed windows the flooding was a result of extreme weather events before P Ltd sealed the building in late 2022.
- [10] As stated, I accept the windows leaked. There is insufficient evidence before me to prove the extent of this leaking or its contribution to the remediation and water damage claimed.

Issue 2

- [11] The respondent admits that the building continued to leak after the windows. It also does not deny that additional flashings and sealing around the window may have been required. However, the respondent claims that it never completed the waterproofing work and had provided a quote for resealing suggesting that if any further waterproofing around the windows was required it would be addressed at that time.
- [12] Further the respondent claims it was never given an opportunity to come back and look at the windows after the parties agreed further waterproofing would be done by third party. NB claims the first he heard of this claim against him was when he received the Tribunal documents.
- [13] I am satisfied on the evidence that the respondent clearly advised the applicant that further waterproofing would be required before the building would be watertight. This is clearly evident in the parties' discussions at the time. Further the replacement windows were installed as part of other work being carried out at the time and cannot be considered in isolation of this work and

advise given at the time. Further the applicant clearly knew that further waterproofing was required given she accepted a further quote of over \$55,000 from the respondent for waterproofing work.¹

- [14] There is no real evidence before me to determine what amount of water egress was due to leaking windows and what amount was due to the obviously extensive watertight issues with the building. As stated above, I place little weight on O Ltd's report given the report is clear that the windows must be removed and reinstalled to achieve any measure of watertightness. OB's evidence is clear that this was not required and that he has water sealed the windows by simply installing new flashings and polyurethane sealant around them. OB was very clear in his evidence that the window installation itself *was fine*.
- [15] The Tribunal is required to apply an evidential standard. The burden on the applicant to prove its claim on the balance of probabilities. The applicant has proved the windows leaked, that new flashings and further sealing around the frames were required. What the applicant has not proved is the contribution of the cracks above the window and other blockwork to the water egress as well as the cost of remedy including any consequential damage. The applicant relies on the temporal connection stating the windows did not leak before the respondent installed new windows and once the windows were sealed there was no further leak. What this submission clearly overlooks is not only were the windows were sealed at that time but also the advised blockwork sealing occurred at the same time. The water egress could have stopped because the windows sealed or more likely could have stopped because the block work was sealed.
- [16] I accept the respondent's evidence that the applicant was clearly made aware of the need to complete the blockwork sealing before any measure of watertightness could be achieved. I also accept the respondent's evidence that not all the water egress around the windows can be put down to the installation given OB's evidence. The more difficult question is what contribution the respondent should make, if any, given inadequate flashings and possibly sealing around the frame itself.

Issue 3

- [17] To determine this I have reviewed the two invoices supplied from P Ltd. A careful review of these invoices show that the applicant is claiming far more than simply resealing the windows and any consequential damage. Invoice 141 clearly shows extensive additional work was carried out,² and the amount that relates to the window itself is unclear. The applicant is clearly expecting far too much reimbursement of the scaffolding cost of \$6,106 plus GST of which it is claiming \$3,080 plus GST from the respondent. OB's evidence is clear that less than \$1,500 could relate to the window work and I am not persuaded by the applicant's redirection of OB's evidence attempting to get him to increase his guess.
- [18] The applicant is also claiming \$7,705 out of the \$8,280 charged by P Ltd to repair water damage inside the building. It would appear that the applicant is claiming that a known leaky building with extensive cracking in the block work and requiring waterproofing estimated by the respondent to cost up to \$55,000, all bar \$575 of this amount is due to leaks around the windows and the respondent's work. I do not find this submission credible. Further OB's evidence, until again redirected by the applicant, was that a large part of the internal remediation work was due to an extreme weather event and flooding. OB is also clear that flooding at the front of the building was not related to the windows. It appears little if any allowance has been made for this in the internal remediation costs sought.
- [19] The applicant has also taken no account in its claim for internal remediation of the water egress caused by the block work itself. I accept the respondent has reduced its claim by a minor amount to take account of small amount of effervescence from ground uptake. The applicant claims this

¹ This work was not carried out with the agreement of the parties when the respondent's circumstances changed.

² I acknowledge the respondent is not being asked to pay for all of this work.

was a minor contributor only, but its own inspection report identifies a major problem causing water egress due to lack of waterproofing at the base of the building and poor drainage.

Issue 4

- [20] It is very difficult from the invoices provided to ascertain exactly what cost the respondent could be liable for. The invoice for interior remediation, invoice number 143 is not itemised, takes no account of water damage caused by the applicant leaving the block work unsealed for over two years or the result of the flood event. I accept there may have been a small amount of damage from leaks around the window, but I do not accept that this was the major cause of internal damage. Further I am persuaded the respondent advised the applicant that the building would continue to leak until it completed the waterproofing. On this basis I find the respondent not liable for any internal remediation.
- [21] Invoice number 141 relates to external work. I am not persuaded any of the scaffolding can be ascribed to the respondent. OB was clear that all the scaffolding was required for sealing of the block work. It was merely fortuitous that window repairs could be carried out at the same time. There is no additional scaffolding proved required to install flashings or sealant.
- [22] I am persuaded the respondents flashings allowed some leak and it is reasonable that the applicant is allowed the amount to remove and reinstall flashings, \$1,180 plus GST. I also allow the amount identified as removing existence sealant \$880 plus GST and a further \$860 plus GST for me sealing around the windows. A total amount of \$3,358.
- [23] I do not allow the amount claimed for grinding of loose paint as this work was required before the block work could be sealed and is not proved to be directly relate to waterproofing issues around the window.

Referee: Hannan DTR

Date: 8 November 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 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>.