



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 180

APPLICANT SQ

RESPONDENT KL

**SECOND
RESPONDENT** L Ltd

The Tribunal orders:

1. The claim by SQ against KL is dismissed.
2. The claim by SQ against L Ltd is proved and L Ltd is to pay SQ the sum of \$13,820.00 on or by 5:00 pm on 15 July 2023.
3. The counterclaim by L Ltd against SQ is dismissed.

Reasons

1. SQ entered into a contract with L Ltd for the construction of a dwelling. SQ now brings a claim against L Ltd for \$13,820.00. L Ltd counterclaims for \$27,820.
2. The issues to be resolved are:
 - (a) Is KL personally liable?
 - (b) Is SQ entitled to a reimbursement of the Council Fees?
 - (c) If so, can L Ltd claim for additional costs?
 - (d) If not, what is the remedy?

Is KL personally liable?

3. There was nothing in the evidence provided which would demonstrate that KL entered into contractual relations with SQ in his personal capacity.
4. Further, the documents demonstrate that KL is the director of a Limited Liability Company and that company entered into a contract with SQ.
5. For these reasons I find that KL is not personally liable for the claim and the claim by SQ against KL in his personal capacity is dismissed.

Is SQ entitled to a reimbursement of the Council Fees?

6. It was not disputed that there was a provisional cost for "Council Fees" included in the quote from L Ltd to SQ. It was also not disputed that the provisional sum for "Council Fees" for \$20,000 +GST was paid by SQ.

7. It was further not disputed that L Ltd paid \$8,255 for the initial Council fees but that SQ paid \$8765.00 directly to the Council for fees associated with Development contributions after having discovered that those fees hadn't been paid by L Ltd. SQ is claiming for the balance of the \$20,000+ because the actual council fees he paid directly came in at well under the provisional sum.
8. KL relied on Clause 1(r) of the contract signed by the parties (the contract) which in summary explains that a provisional sum is an estimate because the final costs cannot be ascertained until they fall.
9. KL also referred to clause 4.2 of the contract which provides that the provisional sum will be recalculated with reference to the actual costs incurred with the relevant aspect of building work.
10. KL submitted that L Ltd had incurred substantial labour costs in connection to the council fees.
11. KL submitted that the provisional sum of \$20,000.00 + GST was spent in dealing with the Council.
12. KL provided an invoice dated 04 August 2022 produced several months after 'the contract completion date in February 2022. That invoice listed the Council inspection costs which required KL's presence as the LBP. The invoice also listed \$2,883.20 for hours for Council liaising; costs for requests for further information for \$2,605.44 and other costs including mileage, administration, stationary and a ps3 package and ps4 certificate.
13. I have considered both L Ltd's and SQ's written, and oral submissions and I am satisfied that SQ has proved that it is more likely than not that SQ is entitled to a refund of the balance of the provisional sum as claimed. I make my findings for the following reasons:
14. Essentially SQ interprets the provisional sum "Council Fees" to mean the fees that the council charges.
15. KL on the other hand interprets the provisional sum "Council Fees" to include the costs in the August 2022 Invoice to be actual expenditure incurred in connection with the relevant aspect of the building work.
16. Because both SQ and KL hold different interpretations of the same term, I consider there is ambiguity in its intended meaning in the contract. The well established rule of contractual interpretation is where a term is ambiguous it should be interpreted against the drafter of the contract. In other words, in the current dispute the rule supports SQ's interpretation because he didn't draft the contract.
17. For these reasons I am satisfied that Council Fees means fees that are incurred and charged by the council rather than fees that are incurred by the builder in relation to working with the council.
18. For these reasons I find the claim by SQ against L Ltd is proved on the balance of probabilities.

Is L Ltd entitled to its claim for additional costs incurred but not previously invoiced?

19. KL said that he looked over the entire project and found cost increases that he had not previously noticed and had not previously invoiced SQ for.
20. KL submitted that L Ltd had incurred costs due to increase in the price of cedar cladding, Triclad cladding, and Gib cost increases. KL also submitted that variations to the kitchen design had not previously been accounted for resulting in further increased costs which should be paid for by SQ as part of the building contract.
21. There was considerable discussion during the hearing about the additional costs and KL acknowledged that some of the amounts he is claiming could be reduced after considering SQ's submissions.

22. I am not satisfied that L Ltd is entitled to payment for previously overlooked costs. The contract was a fixed price contract which did allow for some variations. However, the contract consisted of progress payments and a final payment in conclusion of the contract in compliance with the Construction Contract Act 2002.
23. It was not disputed that KL sent SQ a letter dated 19 February 2022 stating: “[L Ltd] has now reached contract completion on your house build and as per contract completion I have attached your final progress payment invoice”. SQ and KL signed off the completion of the contract on 22 February after the final payment was made.
24. One of the reasons for having the rules is to ensure that the parties know exactly where they stand.
25. I am satisfied that the contract had been concluded over a year before the claim was filed and there has been no evidence that SQ breached the contract in anyway.
26. For these reasons I find that the counterclaim by L Ltd is dismissed.
27. For these reasons I find the claim by SQ against L Ltd is proved and L Ltd is to pay SQ the sum of \$13,820.00.

Referee: K Johnson
Date: 22 June 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>.