



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 624

APPLICANT **TD Limited**

RESPONDENT **SC Limited**

The Tribunal orders, on the claim and counter-claim:

SC Ltd is to pay \$9557.92 to TD Ltd on or before 19 December 2023.

Reasons

1. SC Ltd contracted TD Ltd to build a 50sqm deck at a coastal property where SC Ltd was doing extensive renovation work for the homeowners. SC Ltd had given their client a price of around \$30,000+GST for the deck (though say that increased in the end to around \$40,000.00 inclusive due to changes in materials used) but there was no discussion as to price with TD Ltd so the contract between the parties to this dispute proceeded on a charge-up basis.
2. When TD Ltd had finished the framing for the deck, a dispute arose about various aspects of the invoice they presented for \$19,337.22. TU for TD Ltd says he walked off the job because UV for SC Ltd told him his invoice would not be paid.
3. There is also a dispute about the method by which TD Ltd fixed the deck framing to the house – after TD Ltd left the site, SC Ltd hired another builder who, under the instruction of the site engineer, removed the fixings done by TD Ltd and applied the fixings method approved by the engineer. SC Ltd claims there was also various other work of TD Ltd's that required rectification.
4. Since TD Ltd lodged its claim for payment of its \$19,337.22 invoice, SC Ltd has paid \$6412.00 to TD Ltd, based on its claimed deductions off TD Ltd's invoice as well as claimed remedial costs for work that was carried out after TD Ltd left the job – those deductions and claimed remedial costs are the basis of SC Ltd's counter-claim for \$12,924.45.
5. The issues to be determined are:
 - On the claim, was the \$19,337.22 invoiced by TD Ltd a reasonable sum for the proportion of work completed on the deck at the time they left the job?
 - Did TD Ltd fail to follow detailed fixing plans or site instructions with respect to the method of fixing the deck framing to the house, and/or should TD Ltd have known that they would be required to provide information/evidence of the fixing method used to the site engineer for the purposes of his PS3 for Council?

- On the counter-claim, what deductions are warranted from the amount invoiced by TD Ltd?
- On the counter-claim, what costs have been established as remedial costs resulting from TD Ltd's work?
- What is payable on the claim and counter-claim?

On the claim, was the \$19,337.22 invoiced by TD Ltd a reasonable sum for the proportion of work completed on the deck at the time they left the job?

6. TU estimates that the deck framing represented well more than half the total work for the deck – he stated that it would have taken him and his worker a further two days to lay the decking and another two days to do the stairs, being another \$10,000.00 labour at the most.
7. Even though SC Ltd and TD Ltd had not discussed a price or budget for the work, the above figures are broadly consistent with the price SC Ltd says they gave their client for the deck.
8. For these reasons and in the absence of any independent assessment of the value of TD Ltd's work when they left and/or independent review of their invoicing, I accept \$19,337.22 minus the \$6412.00 already paid, being \$12,925.22, as the appropriate starting point for determining what SC Ltd is liable to pay TD Ltd for the work undertaken (subject of course to the deductions and remedial costs claimed under the counter-claim which will be addressed below).

Did TD Ltd fail to follow detailed fixing plans or site instructions with respect to the method of fixing the deck framing to the house, and/or should TD Ltd have known that they would be required to provide information/evidence of the fixing method used to the site engineer for the purposes of his PS3 for Council?

9. I find that it has not been proven on the balance of probabilities that TD Ltd was told, knew, or should have known that they would be required to prove the method of concrete nib construction employed so that the site engineer would have that information to use in the process of Council inspection. The detailed fixing plans that SC Ltd says were available on site (even if they were not given directly to TD Ltd) were not provided as evidence to the Tribunal. There is a 'she-said, he-said' type dispute about whether there were verbal site instructions given to TU and about whether any discussion was had at all about the method of fixing the deck to the house.
10. SC Ltd says that consultation about the fixing details was required because the house has a non-standard foundation and there were structural engineering issues – UV says that TU was told that during a site meeting between the two of them and also says that there were detailed plans of the fixing method available on the site. TU says that the plans he was given (which he provided at the hearing) did not include any fixing details and that no discussion at all was had about fixing details – he worked off the plans he was given and applied his own knowledge and experience. He has provided a letter from SD (an LBP builder) of MS Ltd, which states that SD reviewed photographs and a site plan and notes that "the plans are lacking clear details of any fixing between the existing block wall and deck. What has been built in my experience seems adequate."
11. SC Ltd has provided an email from their site engineer, QQ of QQ Ltd which stated that, on a site visit, QQ "noted that additional concrete nib has been poured against the existing footing. No details of this was provided. The nib was supporting the new deck and therefore needs to be structurally sound". He stated further that "The Builder could not provide sufficient photos of the nib construction hence PS3 was requested. However, the PS3 did not cover the concrete nib construction and therefore could not be relied on. It was therefore decided to add additional

timber to take load off the concrete nib". From the engineer's statement, I cannot conclude that the method TD Ltd employed was incorrect and/or inadequate, only that there was an inadequate record of it to feed into the engineer's producer statement.

12. TU says that as the deck did not require building consent, there was no requirement for any documentation for building consent purposes. UV says that as Council was to be inspecting other aspects of the house renovations, they would also be looking at the fixing methods used in attaching the deck to the house foundations. I accept that may well be the case, even when the deck itself does not need a building consent, but the key issue to determine is whether or not TU/TD Ltd was made aware of that or should have been aware of that (as a matter of general building practice/knowledge). I find there to be insufficient evidence available to prove either that he was made aware of that (via either plans or verbal instructions) or that he should have been aware of the need for a record to be kept for the engineer, especially in the situation where no building consent was required for the work he had been contracted to provide.
13. It follows from the above finding that no remedial costs associated with re-doing the fixings are payable by TD Ltd. This will be reflected below in the detailed consideration of the claimed amounts under SC Ltd's counter-claim.

On the counter-claim, what deductions are warranted from the amount invoiced by TD Ltd?

14. I will address SC Ltd's claimed deductions point by point, as listed in SC Ltd's invoice to TD Ltd dated 22/09/22:
15. \$94.65 – I accept SC Ltd's point that the [hire] cost passed on to SC Ltd by TD Ltd includes a bond amount of \$94.65. This cannot be invoiced to SC LTD because it was presumably refunded to TD Ltd and is therefore not a chargeable cost. Deduction of \$94.65 proven by SC Ltd.
16. \$163.75 – I accept SC LTD's point that TD Ltd's supplier invoice is \$163.75 less than TD Ltd invoiced to SC Ltd for these costs. I note further that TD Ltd's other supplier invoices have been on-charged to SC Ltd without any mark-up so it appears that the amount on-charged for [metal fabricator's] supplies was an error. Deduction of \$163.75 proven by SC Ltd.
17. \$122.50 – this claimed deduction is for blades purchased by TD Ltd for the job the day before they left site permanently. While I consider that 'consumable' tools/supplies are chargeable to a job, in this case TD Ltd has the benefit of the item but did not use it (much) on this job so cannot invoice SC Ltd for its purchase. Deduction of \$122.50 proven by SC Ltd.
18. \$85.80 – TU accepts (and I concur) that a purchase of gumboots should not have been invoiced to SC Ltd. Deduction of \$85.80 is proven.
19. \$73.79 – this claimed deduction relates to whether particular goods were used on site. TU says they were and UV says they weren't. There is no objective evidence available and TU has provided the supplier invoice which is within the date range that he was on SC Ltd's site, so no deduction is proven as justified.
20. \$977.50 – SC Ltd wishes to deduct 10 hours labour from TD Ltd's invoice on the basis that TD Ltd was not actually working during these hours. UV provided a letter from her client in support of that contention. However, disputes about hours spent on site are notoriously difficult to prove unless a signed record is kept by a relatively independent party on site, which was not the case here. Even if I could that the client was always present and had 'perfect' knowledge of TU's hours on site, 10 hours can easily be accumulated off-site over 10 days on a job (and TD Ltd was working on the job at least that long) when collecting materials and supplies. I find therefore that this claimed deduction is not warranted.
21. \$977.50 – I do not accept TU's proposition that it is standard to charge for lunch breaks, even if 'work is discussed' during them. Deduction of \$977.50 proven.

22. \$1632.00 – this claimed amount for SC Ltd’s internal charges relating to concrete removal will be addressed together with the external supplier remedial costs claimed below (at findings 37 and 38).
23. \$862.00 – these charges relate to costs arising from the dispute about the method of fixing the deck to the house foundations and is not proven as per findings 9-13.
24. \$360.00 – I accept TD Ltd’s contention that it is reasonable and standard practice to charge vehicle expenses on a charge-up job. No deduction is proven.
25. The above amounts total deductions of \$1444.20 to be subtracted from the amount outstanding to TD Ltd of \$12,925.22.

On the counter-claim, what costs have been established as remedial costs resulting from TD Ltd’s work?

26. With respect to repairs to the deck joists installed by TD Ltd, I accept TD Ltd’s contention that some adjustments and repairs were necessary by their subsequent sub-contractor on the basis that their sub-contractor invoices provided describe some remedial-type work of this nature. I note that this is also consistent with the LBP Board’s comment (in the course of their written decision not to proceed with the complaint against TD Ltd) that there were (nevertheless) some minor issues with how the build was carried out. However, I do not consider that the extent of remedial work required with respect to joist repairs/adjustments has been proven and as the supplier invoices do not adequately itemise time spent of joist repairs, only a proportion of these claimed remedial costs will be awarded (see each claimed amount below).
27. With respect to the concrete left on site by TD Ltd, I accept the reasons TU has given for this in terms of it being a temporary measure which gave them easy access across the muddy site, and I also accept that had TD Ltd stayed on the job, they would have broken up the concrete and disposed of it themselves, as SC Ltd and its subsequent sub-contractors had to do. Because TD Ltd did not complete the job, I consider that they are liable for the reasonable costs of other parties carrying out the concrete removal and the costs for this (including the \$1632.00 claimed at point 22) are addressed in detail below.
28. I will address SC Ltd’s claimed remedial costs point by point, as listed in SC Ltd’s invoice to TD Ltd dated 22/09/22:
29. \$269.99 – I find there is insufficient evidence to prove that these materials relate to defects in TD Ltd’s work.
30. \$282.33 - I find there is insufficient evidence to prove that these materials relate to defects in TD Ltd’s work.
31. \$607.14 – with respect to the bolts, SC Ltd contends that the bolts used by TD Ltd for the deck framing were a bi-metal rather than true stainless steel. While I can see from the evidence provided that SC Ltd incurred the actual cost claimed in replacing the bolts, there was insufficient evidence provided that the product used by TD Ltd was unsuitable or defective, as opposed to a preference or other reason for replacement. This amount is therefore not proven as a remedial cost.
32. \$1182.77 – SC Ltd has claimed a portion of costs from their supplier invoice INV-0193 and has hand-written on that invoice that 8.5 hours out of 17 hours charged was attributable to remedial work to the joists installed by TD Ltd. However, a hand-written assessment by SC Ltd is not sufficient to prove the extent of joist repairs required or actually carried out, in the absence of that having been itemised on the supplier invoice (or any other objective evidence having been provided). The description of the 17 hours on the invoice says “We worked on the existing deck

joists, laid decking, removed curtains, installed smoke sensors, packed a few joists that were uneven". From that description I cannot reasonably attribute 8.5 hours to remedial work on joists and because there is no way to make an accurate assessment of the time spent on that matter as opposed to other work unrelated to TD Ltd, I allow for only a nominal 2 hours for remedial joist work, so \$220+GST is awarded, being \$253.00.

33. \$1090.93 – this claimed amount relates to SC Ltd's supplier invoice INV-0196 and the 7 hours charged for "deck repairs joist and connections". It is not sufficiently clear what exactly this work, charged at \$770+GST, involved and whether 'connections' refer to fixings for the house or some other work for which TD Ltd would not be liable. As a minor degree of joist remedial work is accepted for the reasons given at finding 26, I allow 50% of \$770+GST as attributable to remedial work for which TD Ltd would be liable, being \$442.75. It is not reasonable for SC Ltd to add GST again or claim other mark-ups in addition to the actual remedial cost incurred.
34. \$566.72 – this amount relates to another item from SC Ltd's [supplier invoice], described on the invoice as 8 hours for "Framing bottom step ready for concrete". TD Ltd points out, and I accept, that they did not work at all on the steps before they left the job so these are not remedial costs, but are completion costs which are not claimable. UV has hand-written on the invoice under that item but I cannot read exactly what it says "repair to ?" and described the issue in her invoice to TD Ltd as "bearer misalignment remedial work extra". There is no independent evidence to support SC Ltd's contention that this item in their supplier invoice includes remedial work for which TD Ltd should be liable so this part of the claim is not proven.
35. \$1071.65 – as per findings 9-13, I have already found that TD Ltd is not liable for costs associated with redoing the deck-to-house fixings.
36. \$1631.85 - as per findings 9-13, I have already found that TD Ltd is not liable for costs associated with redoing the deck-to-house fixings.
37. \$871.88 and \$1632.00 – as per finding 27, TD Ltd is liable to pay the reasonable costs associated with breaking up and removal of excess concrete from the site. The external supplier costs are contained on INV-0201 as waste disposal for \$127.70+GST and vehicle charge materials, concrete and waste for \$120+GST. There is also a charge for \$440+GST which is for 'labour one carpenter load out rubbish, concrete in last fence posts, install fence posts. Because that latter cost is not itemised, I allow \$110+GST for concrete rubbish removal. The total external charges TD Ltd is liable to pay is therefore \$411.36.
38. UV for SC Ltd says that the \$1632.00 claimed is SC Ltd's own costs of breaking up and removing concrete from the site, some of which was done by SC Ltd before their sub-contractor started work on site. I accept that there will be some component in there of project management in terms of liaising with the clients over the complaint they received from their neighbour about site coverage infringement concerns because of the extent of concrete in the client's yard. However, there was insufficient description and/or evidence (such as photographs, job sheets etc) of what extent of work was carried out by SC Ltd to support the entire amount claimed and it is reduced by 50% due to lack of such evidence as to the reasonableness of the amount claimed. A total of \$411.36 + \$816.00 = \$1227.36 is awarded for concrete remedial costs.
39. Total remedial costs for joist repairs and concrete removal are \$253.00 + \$442.75 + \$1227.36, being \$1923.11.

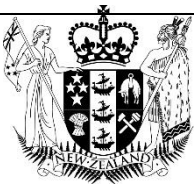
What is payable on the claim and counter-claim?

40. As per all the above findings, on the claim, \$12,925.22 is the starting point for the outstanding balance owed to TD Ltd by SC Ltd. From that, on the counter-claim, \$1444.20 is deducted for over-charges by TD Ltd and a further \$1923.11 is deducted for remedial costs relating to joists and concrete removal.

41. That results in SC Ltd being liable to pay to TD Ltd the amount of \$9557.92.

Referee: DTR Perfect

Date: 21 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 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>.