



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 11

APPLICANT TG

RESPONDENT ES Ltd

The Tribunal orders:

TG is to pay directly to ES Ltd the sum of \$24,890.65 on or before 31 January 2023.

Summary of Reasons:

[1] The hearing was adjourned to allow the respondent to file a counterclaim. The respondent has done so. The applicant is concerned this counterclaim was filed *out of time*. I am satisfied the respondent did lodge the counterclaim within the time limit ordered by the Tribunal, but the Tribunal did not process this claim until 10 November 2022. I will consider the counterclaim.

[2] The applicant has been offered and refused an adjournment to allow her time to consider the documents and has confirmed that she wishes to proceed without adjournment.

Background

[3] The applicant claims \$29,933.00 remediation costs under the parties' building contract. The applicant has provided a list of items that require remediation or completion. The applicant also claims she has been overcharged and seeks a declaration that the further amount charged by the respondent, \$32,046.71 including costs is not due. The applicant claims she should not be liable for this amount as there have been unacceptable cost overruns and she has been overcharged for labour and minor variations among other complaints.

[4] The respondent has filed a counterclaim in the amount of \$24,890.65 seeking payment for building work completed before the contract was terminated by the applicant. The respondent offered to settle this invoice for \$17,907.85 on 30 May 2022 and for \$15,000 at hearing but neither of these offers were accepted.

Issues

- i) Has the applicant been over charged.
- ii) Is the applicant entitled to any remediation costs.

Issue 1

[5] The parties agree they entered into a building contract in October 2021. The contract is evidence in writing dated 22 October 2021. The work included a major renovation of the applicant's home. The contract price was estimated at \$304,211.91 including a 10% contingency.

[6] The parties also agree that by June 2022, the applicant had paid approximately \$305,000 for the renovation. The applicant became concerned about the increasing costs and cancelled the contract and refused to pay the final invoice. The project was abandoned and not all contracted work was completed. The applicant estimates the cost of the remaining work at \$29,933.00. The respondent suggests this is somewhat optimistic and likely to amount to around \$38,000.

[7] The applicant raises a number of ways she claims to have been overcharged.

- 1) The amount charged is more than 15% of the contract price; and
- 2) Little evidence how cost overruns were incurred; and
- 3) No credit for savings made; and
- 4) Discrepancies in variation costs; and
- 5) Inflated labour charges; and
- 6) Being charged to remedy builders mistakes; and
- 7) Lack of communication; and
- 8) The contingency spending has not been itemised.

[8] The respondent denies the above, claims that it has provided extensive documentation to both the applicant and the Tribunal including evidence of the costs charged including the variations. The respondent submits that it cannot be expected to micromanage cost reporting and the information supplied is sufficient to prove its claim for payment.

[9] The respondent admits there have been cost overruns but claims this is due to the very difficult building environment over the last few years and the variations requested. Further the respondent points to the terms of its contract including those recorded as *no allowance* and *provisional sums*. More importantly the respondent refers to me the clear term at the end of the accepted estimate:

It should be noted that there are no allowance for further price escalations or changing market conditions and while all care has been taken to achieve the calculated project value, there is no responsibility taken for cost overruns.

[10] I have carefully considered these claims and the extensive written and oral evidence put before me. Whereas I sympathise with the applicant's position, the evidence does not support her claim she has been overcharged or that the respondent has not adequately documented its work and charges.

[11] The respondent's documentation is excellent. It has provided a carefully worded and comprehensive written contract, evidence of variations agreed including planning requests, clear invoices and when asked, supported these invoices with further records.

[12] I understand the applicant is upset that her project has cost her more than she anticipated, however that is not unusual in builds of this kind. Had the applicant wanted a fixed price contract then that is what she should have contracted for. I do understand that very few if any builders will commit to a fixed price contract. That is because of exactly this issue; never ending cost increases. The respondent clearly advised of this in its contract.

[13] I have considered the applicant's claim that the documents are not detailed enough. Having viewed them I do not agree. I have also considered her claim that she caught a worker leaving the site early one day and this is evidence of labour overcharging. Even if this is true, and there is little evidence to substantiate this given that respondent is able to charge for its worker's travel and the costs of obtaining and delivering product to site, this is not evidence of overcharging of labour. It is simply one instance. Neither am I persuaded of overcharged labour based on the applicant's belief of how long each job should take.

[14] The applicant raises a number of other issues including poor management of costs, overspending, inflated hours and non-refund of credits. None of these claims are supported by the evidence. What appears to have happened on this site, is the same that has happened on sites across the country, building costs are going up at an alarming rate. Given the contract the applicant signed, the risk of this cost increase remains with the applicant, not the respondent. I understand the applicant hoped that her renovation could remain within the estimated costs but there is no evidence before me that the respondent has deliberately underestimated the costs to mislead the applicant. The costs have simply increased as anticipated by the contract.

[15] The applicant cannot expect the certainty of a fixed price contract when only estimated costs were agreed. The respondent has completed the work invoiced for. I find the applicant liable for the invoiced amount. The respondent is not claiming any interest or costs.

Issue 2

[16] The applicant seeks the cost of remediation, estimated by her at \$29,933.00. The respondent admits some work remains uncompleted but submits that is because the applicant cancelled the contract before completion. Further the amount claimed for drainage, \$23,231.09 is not included in the contract estimate.

[17] Having viewed the applicant's list of works requiring completion, I can find no remediation as such, the itemised work is for completion of the contract, work the applicant prevented the respondent from completing. Further the amount claimed for drainage, the majority of the amount sought, is for work that *no allowance* was made for in the contract, and I am not persuaded the respondent should pay for this work because *it neglected to include* it in the contract as claimed by the applicant.

[18] After careful consideration, I am not persuaded the respondent is liable for any remediation costs. The applicant's claim is dismissed.

[19] This order determines both the claim and counterclaim.

Referee: Hannan DTR

Date: 13 April 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>.