



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 775

APPLICANT TL

RESPONDENT OC Limited

The Tribunal orders:

OC Limited is to pay TL \$21,150.00 by 4 January 2024.

Reasons:

1. The claim relates to a house renovation that OC Limited completed for TL in 2018/19. She says a subcontractor painted the wrong product on the cedar cladding. As a result, she says she cannot simply recoat the cladding, but will have to remove the coating previously applied, and will then have to paint the cladding.
2. TL claims compensation of \$25,874.45, which includes the filing fee of \$180.00. The Tribunal cannot award the filing fee. She also claims \$1,437.50 for the cost of a technical report obtained between the two hearing dates, which is a consequential loss the Tribunal can consider.
3. Both parties attended the hearing. OQ represent OC Ltd.

Background

4. In 2018, TL contracted OC Ltd to carry out extensive renovations to her home. The contract price was in excess of \$500,000.00. The renovation included replacing Harditex cladding with vertical cedar shiplap cladding. The architect specified “[Product 1]” coating for the cladding. The painting was carried out by OC Ltd’s sub-contractor ‘H’.
5. In early 2022, TL noticed some of the coating was looking thin and patchy, and areas were starting to peel off. In late 2022, WS the local supplier of the [Product 1]) inspected the cladding. WS concluded that a different product, ‘[Product 2]’ had been used. [Product 1] is a penetrating product, whereas [Product 2] sits on the surface of the timber and requires a special primer to be used.

Law

6. The law of contract and the Consumer Guarantees Act 1993 apply. If the contract specifies a particular product, then the supplier is liable for any losses resulting from the incorrect product being used. The CGA also provides for an implied guarantee in consumer contracts that services will be provided with reasonable care and skill (s 28).

Was the incorrect product used?

7. OQ provided an invoice dated 5 November 2018, showing that he ordered 3 x 10L pails of [Product 1]. He says the project would have required 6 x 10L pails of product and that H ordered the remaining pails required. At the second hearing he provided an invoice from H for \$920.00 for “Extras”, which he says would have been for 40L of product.
8. TL initially claimed the project required 10 x 10L pails of [Product 1], but later said WS estimated 8 x 10L pails. She says there was half a pail of [Product 1] left on site after the end of the work. WS has confirmed that it has no record of H buying either DK or US over the relevant period.
9. TL has provided a copy of a photograph taken by the architect at the time of the renovation, which shows a 10L pail of [Product 2] in a shed. The label on [Product 2] is a blue colour, whereas the label on [Product 1] is purple, so the two products are easily distinguishable. OQ says painters often use other buckets to mix paint. However, the photograph shows a lid on the bucket and the sides of the bucket clean in appearance. It would be highly coincidental if H had used an empty [Product 2] pail to mix [Product 1], and it is more likely that the pail was there because it had been purchased for use on the cedar cladding.
10. TL has provided a report from [Coating product company] which states:

Based on the supporting photo provided to me which shows a bucket of [Product 2] on site, it is likely that the Cedar cladding has not been coated with [Product 1] as specified, but in fact has been coated in [Product 2].

11. The report included photographs of the cladding, showing the product used has formed a film on the surface of the timber, and that it has a satin finish. Neither characteristic is consistent with [Product 1], which penetrates into the timber.
12. Between hearings, TL obtained a technical analysis off three paint samples taken from the cladding (two by her and one by WS) from PQ. The report concludes:

	Sample ID	Identification	Hit Quality
1	Sample 1	Uncertain identification, more likely [Product 2]. No base coat detected	639
2	Sample 2	Uncertain identification, more likely [Product 1]. No base coat detected	712
3	Sample 3	[Product 2]. No base coat detected	955

13. OQ questioned the methodology of the report (PQ not taking the samples itself), and the degree of certainty of the findings. TL says it is standard practice for a laboratory to receive and analyse samples, rather than take its own samples, which I accept. In relation to the degree of certainty, the burden of proof in civil cases is on the balance of probabilities. Therefore, I find that one sample was almost certainly [Product 2], one was more likely than not [Product 2], and one was more likely than not [Product 1].
14. TL has provided correspondence from WS which includes emails from the painter H. In that correspondence he said OC Ltd specified the use of [Product 2] and that he had not used that product before. A separate email from WS records a conversation with the painter in which he claimed that OC Ltd supplied [Product 2], and that he used ‘Quick Prep’ rather than the specified primer (TSC). H then went on to claim that there was a falling out with OC Ltd, after which OC Ltd applied [Product 1] over [Product 2].
15. The evidence attributed to H is not reliable, and the following conclusions can be drawn from the evidence as a whole:
 - a. 3 x 10L pails of [Product 1] were purchased by OC Ltd, well before the painting was completed.

- b. At least 2.5 x 10L of [Product 1] were used, as TL had half a pail left at the end of the job.
- c. At least a further 4 x 10L of product were likely necessary to complete the 'painting' work.
- d. As H invoiced OC Ltd for 'extras', it is likely that H purchased the additional product that was used, although there is no record of him buying it from W.
- e. It is likely that both [Product 1] and [Product 2] were applied to the cedar cladding. Logically, a first coat of [Product 1] was most likely applied to the timber before installation and [Product 2], or a combination of [Product 1] and [Product 2], was applied after the cladding was installed.
- f. Although there is some question whether the timber was coated front and back before installation, I find that it most likely was. This is not material to my findings on liability.

16. Although the painter H has attempted to point the finger at OC Ltd, a finding of fault as between the contractor and subcontractor is not necessary, as the contractor OC Ltd is liable for any failings by the subcontractor. So, whichever party bought the [Product 2], OC Ltd is liable for the consequences of the wrong product being applied to the cedar.

17. TL raised a concern about cupping and splitting of the timber. However, there is insufficient evidence to prove this has resulted from a breach by OC Ltd, as opposed to being a naturally occurring phenomenon.

Is the amount claimed proved?

18. OC Ltd referred to the [Product 1] specification sheet, which states:

... A patchy, thin, faded and uneven appearance or eroded coating on edges indicates the need for recoating.

Highly exposed areas may require an additional coat after 18-36 months to maintain the coating integrity due to movement of the substrate.

It says the specification indicates that [Product 1] is an inferior product, and that an oil-based stain rather than an acrylic should have been used.

19. While this is not relevant to liability, it is potentially relevant to quantum, as the specification indicates that the cedar would probably need recoating within the current timeframe even if the correct product had been used. Therefore, the issue of betterment needs to be considered.

20. TL says that if the correct product had been used, she would have recoated the cedar with [Product 1] herself, and the only cost would have been for the product. There is however an opportunity cost for a consumer doing work themselves, so the likely labour cost needs to be taken into account.

21. OC Ltd says a contractor would have probably charged between \$6,000.00 and \$8,000.00 for materials and labour to recoat with [Product 1]. Based on the merits and justice of the case, I have used the lower figure as a reasonable estimate of the costs TL would have likely incurred had there been no breach.

22. TL says a large part the remedial quote is to remove the existing coating, which is necessary before a new coating can be applied. As the surface of the cedar is rough sawn, and the face of the timber is 110mm wide, with gaps between each plank, I find that this is likely to be the case. As the preparatory work is directly related to the wrong product being used, OC Ltd is liable for the cost.

23. TL says her painter has told her that the only realistic option is to paint the cladding, which is not the look she originally intended, although the manufacturer says a penetrating stain could be used once the old coating is removed. Because she is only claiming for the cost of remedial work, and not for any intangible losses, the conflicting evidence does not affect quantum.

24. In summary, a fair outcome is achieved by deducting the cost that would have probably been incurred anyway (\$6,000.00) from the remedial quote (\$25,694.45), which is \$19,694.45.

25. I find that the cost of obtaining an expert report is a reasonably foreseeable loss resulting from the breach, therefore this element of the claim is proved.
26. This brings the total to \$21,131.95, which (because calculating compensation is not an exact science) I have rounded to \$21,150.00.

Referee: J P Smith

Date: 14 December 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>.