



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2020] NZDT 1360**

**APPLICANT TO Limited**

**RESPONDENT TX**

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

TO Limited is to pay \$7040.48 directly to TX on or before 22 January 2021.

**Reasons**

1. TX engaged TO Ltd ('TO') to provide landscaping services at his family's home. A detailed written scope of works was priced up as a "provisional estimate", including a mixture of estimates and provisional sums, with a total value of \$144,054.00 plus GST. The contract was signed on 4 March 2019.
2. Subsequently the parties agree that work totalling approximately \$43,200.00 plus GST was removed from the contract as "not required".
3. On 4 April 2019 a variation order was issued to reflect a change in materials for a path going around the side of the house – in the original contract it was to be a concrete path estimated at \$5100.00 plus GST but it was changed to Portland Stone (to be the same as the patio area). The variation order is for \$7000.00 plus GST and there is a significant dispute over that charge, with TX saying he agreed to \$7000.00 plus GST as the new total price for the path and TO saying that the variation order amount is in addition to the original estimate.
4. A separate price was negotiated and agreed for the supply and installation of StoneSet coping around the swimming pool, the final price agreed upon for that item (excluding works to the glass pool fence) being \$33,710.00 plus GST. TX argues that this was a fixed price and TO contends that it was on the same basis as the other prices for the rest of the landscaping (TO issued this price as a variation order with the same contract number as the rest of the work).
5. During the course of the project, disputes arose over the quality of the work being done and also over the amounts being invoiced. The dispute led to an early finish of the job with some of the agreed work only partially completed. The parties agree that TX has paid a total of \$143,521.44 to TO to date.

6. TO claims unpaid invoices of \$18,306.22. The balance of TO's \$25,805.75 claim is contractual interest at 10% compounding per month. The amount already paid plus the amount claimed in unpaid invoices totals \$161,827.66 which TO contends is the value of work completed at TX's property.
7. TX counter-claims \$30,000.00, representing in part amounts he says have been over-charged and in part remedial costs. Although the counter-claim includes amounts that TX says were over-charged, these will all be addressed within the claim in terms of what should be charged/paid for work done. I will address TX's claim for actual remedial costs under the counter-claim.
8. I make a general statement here about the approach taken in determining the issues below because of the difficulty in comparing the parties' initially differing methods, contained within comprehensive spreadsheets, of identifying costs for the project.
9. Some prices in TO's detailed contract breakdown were estimates and some were provisional sums, meaning that the total contract price cannot be looked at (even with a margin added) and compared to what had been paid when work stopped. That approach would have been made even more difficult by the fact that there is no information/evidence on what percentage of work was complete when the dispute brought the contract to a premature end. Although TO's Mr B has argued that the contract price should be looked at as a whole and not broken down on a per-item basis, the latter approach is unavoidable due to the uncertainties of price and percentage completion.
10. In the context of a contract that combines estimates with provisional sums, the approach taken for work for which the contract specified provisional sums must be consistent with the Consumer Guarantees Act 1993 provisions around "reasonable price" because the prices were somewhat, but not entirely fixed by the contract. For items which were estimated, the price will be looked at in terms of completion and a maximum 15% margin.

**11. The issues to determine are:**

Claim/Counter-Claim for 'over-charged' items

- Did TX agree to a variation on the total price for the stone path at the side of the house of an additional \$7000.00 plus GST?
- What portion of work under 'Remedial works' and 'Excavation' (Items 1 and 2) in the contract was carried out, and is the amount invoiced by TO for the work done consistent with the contract estimate/provisional sums?
- Given the change in scope to work on the fence/new frame under the vines, what is a reasonable price for the work done?
- What portion of the irrigation work contracted to be carried out by TO was completed and what is a reasonable charge?
- Was the price agreed for the StoneSet work around the pool an estimate or a fixed price, was TO entitled to treat the installation of StoneSet in the area around the pool cover as a variation and was the total amount invoiced for StoneSet work consistent with the price agreed with TX?
- What is payable by TX on the claim?

Remedial Costs/Counter-claim

- Is the product of TO's service in relation to the paving stones and the lawn fit for purpose, and if not what remedy is available to TX?
- What is payable by TO on the counter-claim?

### Summary

- What is payable on the claim and counter-claim?

### Claim/Counter-Claim for 'over-charged' items

*Did TX agree to a variation on the total price for the stone path at the side of the house of an additional \$7000.00 plus GST?*

- I find that there was no meeting of the minds with respect to the variation to the total price for the stone path and that TO's variation order was not clear nor was it consistent with other comparable pricing for paving with the same product. This results in a reduction in TO's claim of \$9124.18 – the reasons for this finding and the calculation of the reduction is set out below.
- The parties agreed that there was to be a change in materials for a path going around the side of the house – in the original contract it was to be a concrete path estimated at \$5100.00 plus GST but it was changed to Portland Stone (to be the same as the patio area). The variation order is for \$7000.00 plus GST and there is a significant dispute over that charge, with TX saying he agreed to \$7000.00 plus GST as the new total price for the path and TO saying that the variation order amount is in addition to the original estimate.
- TO actually invoiced \$17,174.18 (incl GST) for the side path, well in excess of the \$12,100+GST it says it estimated (including its variation), but TX points out that even at \$12,100+GST, the price comparison to the patio area, which was to be paved in Portland Stone from the outset, does not stack up which is why he understood the \$7000+GST variation to be the total price for the side path.
- The patio area is 24sqm and was invoiced by TO at \$9700+GST (even though \$13,900+GST had been estimated in the original price breakdown) whereas the side path is 12sqm and, according to TO, was to be invoiced at \$12,100+GST (and was actually invoiced at significantly more). TO explains this price anomaly as being due to the larger patio area being more straight-forward to pave, with less cutting involved. However TX has shown photographs of the patio area which has two rectangular vege beds within it, meaning there is at least as much cutting involved in laying the stone around the beds as there would be in laying the side path.
- For these reasons, \$7000+GST as an additional cost does not make sense in the context of the already-estimated patio area and TO did not make it clear, nor give any reasonable justification for why the \$7000+GST was additional to the \$5100+GST estimate already given for the side path. I therefore find that there was no meeting of the minds over this price and find that it was reasonable for TX to accept the \$7000+GST on the basis that it was the new total price for the side path. I note that it is exactly half the price estimated originally for the patio area which is twice the size.
- I further note that the patio area was actually invoiced at significantly less than the estimated price, but due to the significant dispute over the variation order, I do not reduce the total price of \$7000+GST further to match this proportionality and allow TO the full \$7000+GST for paving the side path.
- As TO actually charged \$3221.41+GST plus \$11,712.66+GST for the side path, a total of \$17,174.18, the difference between what was charged and what I deem payable (\$7000+GST = \$8050) is **\$9124.18 and this is deducted from TO's claimed amount.**

*What portion of work under 'Remedial works' and 'Excavation' (Items 1 and 2) in the contract was carried out, and is the amount invoiced by TO for the work done consistent with the contract estimate/provisional sums?*

19. Remedial on site – TX contends that most of the 'remedial' work from the contract scope was not carried out by TO, yet TO has charged the majority of the cost stated in the provisional estimate. There were a significant number of items in the original scope that were carried out by TX himself (from 'tree house removal' down in TO's breakdown list). The provisional sum for all the remedial on-site work was \$8400+GST and the actual amount charged was \$6350.69+GST which was for 2 days of vegetation clearing.
20. In terms of what was actually carried out by TO, because this item was priced as a provisional sum, it will be looked at in terms of 'reasonable price' under the CGA guarantee (section 31). TX has provided photographs of the site before work began which appear to show a vegetation clearing job of minimal scope. TO's invoices seem to indicate that a small amount of vegetation was removed from site as only 2 small truckloads were charged. Given this, I find that TO has not justified its charge of \$6350.69 for the actual work done.
21. Also, as a proportion of the total scope of work originally priced under 'remedial works', vegetation removal is approximately one-sixth of the total work listed. The reasonable charge for the vegetation removal is therefore set at one-sixth of \$8400+GST, being \$1610 incl GST. This equates to a charge of \$800 per day assuming two days work were done as stated, which is within acceptable 'reasonable' rates for a couple of workers.
- 22. The above finding results in a reduction for remedial work in the overall claim of \$5693.29 incl GST.**
23. Excavation – the price provided originally for excavation was also a provisional sum and the parties agree that there were changes required to the areas needing to be excavated and therefore the amount of spoil removed – these changes affected the final price significantly. Both parties have provided extensive calculations estimating the amount of spoil that should have been removed but both are based on estimates of depth which cannot be proven.
24. As TX is unable to establish what work was actually carried out with respect to excavation in terms of what amount of spoil was removed, I find that there is no basis upon which to adjust the price invoiced by TO for this item, rather the remedial issues with respect to the 'sinking' path will be addressed under the counter-claim.

*Given the change in scope to work on the fence/new frame under the vines, what is a reasonable price for the work done?*

25. The original scope of work included installation of 10 metres of trellis frame to the top of the fence either side of the vegetable garden, with allowance for spray painting to match the fence – that work was estimated at \$2500+GST. This scope was changed by agreement, with TX describing what was actually put in as being a new timber frame under the vines, for which he dug the holes and installed new posts, and for which TO poured the concrete, and attached a cross-beam and wires.
26. As the scope changed entirely, the estimated price is of no relevance and TO may charge only a reasonable price for the work actually done. TO invoiced \$1035.77 (incl GST) and TX says in his view the job was worth \$400-\$500 at most. Given the description of the job, which TO agrees with in terms of what was involved, I find that TO cannot justify its charge on a time basis and allow half of what was invoiced, **meaning a reduction in TO's claim of \$517.89.**

*What portion of the irrigation work contracted to be carried out by TO was completed and what is a reasonable charge?*

27. The irrigation allowed for in the contract scope was only partially completed by TO when the contract came to an end. The contract provided a provisional sum of \$3000+GST for irrigation (to upgrade existing irrigation system) and TO invoiced \$1155.98+GST.
28. TX says that very little work was done – he says (and provided a photograph to show) that four pipes were laid under topsoil and under a path but that they are too thin to be effective as irrigation pipes, and that no controllers and no other materials were left for completion.
29. Mr B for TO says that the provisional sum only allowed for one additional irrigation zone and I note that the contract scope does not specify what ‘upgrade to existing irrigation system’ involves. For this reason and because there is no independent evidence from TX as to the efficacy or otherwise of what was installed, I find that no adjustment to the amount charged by TO is justified.

*Was the price agreed for the StoneSet work around the pool an estimate or a fixed price, was TO entitled to treat the installation of StoneSet in the area around the pool cover as a variation and was the total amount invoiced for StoneSet work consistent with the price agreed with TX?*

30. A price was given by TO for the Stoneset work after the original contract had been agreed – TX says verbal communications about the price were always to the effect that the Stoneset price was a fixed price, and that he relied on that because he decided to go ahead with it on the basis of a price comparison to other materials such as tiles and concrete overlay. TX maintains that the Stoneset work was a separate contract to the rest of the landscaping and had been agreed on a different basis.
31. However, TO has priced the Stoneset work in writing on a variation order with the contract number noted as the same as the original contract. That document does not include the wording ‘estimate’ or ‘quotation’ or ‘provisional sum’. TX points out that he did not sign any variation order. However, the document clearly captures the amended version of the scope of works that was agreed between the two parties and TX accepted the price stated (albeit he says on the understanding that it was a fixed price).
32. As it is TX who wishes to hold TO to charging this item on a fixed price basis, he needed to ensure that any documentation reflected that, and it does not. I therefore find that the price given by TO is an estimate, consistent with the rest of the contract.
33. While I accept that the hole next to the swimming pool for a pool cover was there when TO priced the job originally, TO says that they were not aware that a cover was going to be installed and the installation of the pool cover necessitated an extra amount of Stoneset being laid which they had to return to site to complete. They have charged for that time and product at \$2237.40+GST (\$2573.01) on the basis that it was additional to the work they had anticipated when pricing, and I accept that charge is reasonable as an extra.
34. The originally estimated amount of \$33,710+GST (\$38,766.50) plus a maximum 15% margin comes to \$44,581.48. TO invoiced \$40,059.52+GST for the StoneSet work, a total of \$46,068.45, including the ‘extra’ amount of \$2573.01. This means that the originally priced work was charged at close to the maximum 15% margin. Mr B says that was because it took a bit longer than expected. He acknowledges that TO returned to complete remedial work around the edge of the pool but says that extra time was not charged for.
35. TX says there were major problems at the edge of the pool and the remedial work has left a slight overhang (visible as a shaded line in the photographs) around the edges, which has a rough edge that his children scrape their legs on when getting out of the pool. He has shown photographs of cracks in the StoneSet surface and an embedded nail (which TO has said can be easily removed).

36. Because there is no other supplier that can lay this product, TX seeks no specific remedial costs in the counter-claim, so I deal with a remedy for the acknowledged problems by way of reduction in value under section 32(b)(ii) of the CGA, because there has been a failure of guarantee as to fitness for a particular purpose (the product of TO's service is not fit for purpose).
37. As it is difficult to quantify such a reduction in value, and TX indicates that this landscaping dispute has led the family to decide to sell and move house, I set the adjusted value by reducing charges simply to those originally estimated by TO plus the allowed 'extra', resulting in a total payable of \$41,339.51, a difference of **\$4728.94** to the \$46,068.45 charged.

*What is payable by TX on the claim?*

38. I have not calculated the value of work done by TO in accordance with TX's method of comparison to prices he obtained from third party landscaping companies, as outlined in his submissions, because as TO points out, their overall charge-out rates appear to be considerably less than TO's and TX did accept a contract based on TO's rates. Instead the reductions item by item are based on actual work completed by TO and compared to TO's estimated prices/scope, insofar as that has been able to be determined.
39. I have not addressed the supply of leftover stones to TX by TO as there was insufficient evidence either way to show whether stone was charged for and/or left on site by TO.
40. The effect of the reductions in findings 18, 22, 26 and 37 of \$9124.18, \$5693.29, \$517.89 and \$4728.94 respectively, is a total deduction from the \$18,306.22 claimed amount of \$20,064.30, **meaning a refund of \$1758.08 is due to TX.**
41. Due to the deductions from the claimed amount being greater than the amount claimed, no contractual interest is payable to TO.

*Remedial Costs/Counter-claim*

*Is the product of TO's service in relation to the paving stones and the lawn fit for purpose, and if not what remedy is available to TX?*

42. Section 29 of the CGA provides a guarantee that the product of a service will be fit for purpose. Mr B acknowledged at the hearing, and I can see from photographic evidence provided by TX, that the paving stones laid into the lawn are 'sinking'. I find it therefore to be proven that the stepping stone path is not fit for purpose.
43. It is more difficult to determine directly whether or not the state of the lawn is related to the quality of TO's service – TO points out that it is looking lush in the real estate photos (the property was on the market at the time of the final hearing). TX says that is because he has spent many hours cultivating the lawn surface but that he has been advised that the problems are with the base course (and that is why the stepping stones have sunk into the lawn) and that it has been a 'swamp' all through winter.
44. This latter argument makes sense in terms of the cause of the 'sinking' stones – they would not be 'sinking' but for a poor lawn base and so I accept that remedial work to both stones and lawn is needed. TX has provided two quotations for remedial work and **I award the lower of those being \$5282.40**, that being the most reasonable price the remedial work could be done for, rather than an average of the quotations as claimed by TX.
45. I note that TX withdrew his claim for damage to clothing at the hearing. With respect to the other amounts claimed in the counter-claim, while I accept that TX has spent a considerable amount of time addressing and remedying problems with the landscaping work, such as

aerating the lawn and removing excess water, and cleaning mud from the StoneSet due to the lawn failure, time cost is not generally compensated for under CGA remedies unless there has been a related direct cost/loss of income that can be proven. For this reason, no further amounts are awarded as claimed on the counter-claim.

### Summary

*What is payable on the claim and counter-claim?*

46. As per finding 40, TO is liable to pay TX a refund of \$1758.08 on the claim, and as per finding 43, TO is liable to pay TX remedial costs of \$5282.40 on the counter-claim, resulting in a total amount payable by TO to TX of \$7040.48.

**Referee:**

**Date: 11 December 2020**



## 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 28 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 28 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 28 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>.