



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 607

APPLICANT **XD Ltd**

RESPONDENT **QC**

The Tribunal orders:

1. QC is to pay XD Ltd \$5675.18 on or by 1 December 2023.

Reasons

2. QC and [his wife] built a new house in [suburb]. Unfortunately, the original builder went into liquidation before the house was completed, leaving them with some \$200,000 of work paid for, but for which they needed to retain new contractors at an additional cost. In late 2022, QC met with XD Ltd and discussed work to be done to install washing lines, and to complete retaining, driveways, patios, fencing, decking, and landscaping.
3. An estimate was produced to complete the work with a price of \$48,016.80. Work had begun on some items in mid-March to fit in with other trades. This and the terms and conditions attached were accepted by QC in early April 2023. The estimate was amended on 2 March 2023, removing the decking, and adding an additional concreted area to the front of the house.
4. The original intention had been to start the work in early March and for it to be completed in a single block of work. However, the schedule was changed and pushed out. QC says these delays happened due to XD Ltd. XD Ltd says the delays were due to QC's mis-management of other trades. There were variations to the work including the addition of founding pads for heat pumps and hot water cylinders, and the widening of paths.
5. The work progressed with a few issues arising, including:
 - a. damage to heat pump pipes, which QC blames XD Ltd for, but which XD Ltd denies;
 - b. a sewage pipe was damaged by XD Ltd while auguring a posthole, XD Ltd claims that no site plans were provided by QC;
 - c. the paths were widened to 900 mm, which XD Ltd says was due to a request from QC, but which QC says was never requested; and
 - d. in a number of places, the paths are between 40 and 60 mm from the bottom of the cladding, failing to meet the minimum building code clearance requirement for cladding start at least 100 mm above hard paving.
6. Invoices were issued:
 - a. \$ 11,137.68
 - b. \$ 11,468.31
 - c. \$ 1755.87

d. \$ 12,095.63
Total \$ 36,457.49

7. QC has paid all but the last invoice. He has withheld payment to address the issues referred to at [5].
8. Disputes have arisen about these issues, and additionally QC has raised other issues including; the extent of the work done, alleged quality issues, the completion of retaining work, whether or not drainage course was installed behind retaining, allegations that paving has insufficient fall away from the home and alleged defects in the work.
9. Of the issues above at [5] XD Ltd has fixed the broken sewage pipe, although this was charged to QC, and has offered to install slot drains beneath the cladding which will provide the necessary clearance. However, QC has refused to let XD Ltd back on site to complete this work.
10. XD Ltd has bought a claim against QC seeking payment of the unpaid invoice. QC has bought a counterclaim seeking \$29,249.56. This is calculated based on:
 - a. the demolition and replacement of all concrete paths;
 - b. the repair costs for the damage to the heat pump pipes;
 - c. lost rental for the Granny flat, and accommodation costs;
 - d. interest on amounts paid; and
 - e. legal fees.

The hearing

11. A hearing was held on 15 September 2023, at the conclusion of which I issued a direction that XD Ltd would provide details of its cost to remedy the cladding clearance issue. QC was then to have his expert comment on the costing, and XD Ltd had a right of reply. After this the hearing was to be concluded on the papers.
12. XD Ltd provided its costings and in response QC made 3 pages of detailed submissions, raising new grounds that were not argued at the hearing. He alleged further overcharging and negligence, sent in evidence from [redacted] City Council regarding various issues which had been covered off during the hearing, and which were unrelated to the costing issue he was directed to respond to. XD Ltd's response also included comment on these issues.
13. I have considered whether it is necessary for me to consider the additional issues raised by QC and responded to by XD Ltd. I observe that the issues raised by QC are reasonably extensive, and he had the opportunity to have raised these issues during the hearing but did not do so. To properly consider these issues would require a second hearing.
14. I must consider evidence which is put before me as part of the hearing process. However, the direction clearly set out that the parties were to consider the cost of remedying the cladding issue. This was not an invitation for new causes of action or alleged defects to be raised. I consider that the hearing was closed on 15 September, but for the narrow issue relating to XD Ltd's pricing for correcting the cladding issue. To allow parties to continue to raise issues after the close of hearing would be inefficient and would make certainty and resolution impossible. Therefore, I will not consider the new grounds raised by QC, or XD Ltd's responses.

Issues

15. To resolve the claim and counterclaim I need to consider;
 - a. What law is to be considered?
 - b. who damaged the heatpump pipes?
 - c. Who is liable for the damage to the sewer pipe?
 - d. Was there a variation relating to the widening of paths?
 - e. Do the paths have sufficient fall?
 - f. Are there defects in the finishing of XD Ltd's work?

- g. Are there defects in driveway drainage channels?
- h. Are there defects in the retaining and lawn-laying work?
- i. What is a reasonable response to the cladding clearance issue?
- j. What other costs or damages can be awarded?

The law

16. XD Ltd is claiming that the non-payment of its invoice is a breach of contract. This claim is legally straightforward, as the contract provides that XD Ltd will provide services in return for payment from QC. By failing to make payment in the time set out the invoices, QC is in breach of contract. His defence against that breach is that XD Ltd has failed to uphold its side of the bargain due to the alleged defects.
17. QC is claiming that XD Ltd's work was not fit for purpose and therefore is in breach of the Consumer Guarantees Act 1993 (CGA). The CGA implies guarantees into contracts, one of which is that services are provided with reasonable care and skill (s 28 CGA) and are reasonably fit for the particular purpose for which they are obtained (29 CGA). This claim must be considered as relating to the provision of services, rather than to products because concrete paths and retaining are fixtures to land and are, therefore, excluded by the definition of products under the CGA.
18. QC alleges a number of defects which are discussed below. For each allegation I must consider whether the service (the installation of the feature in question) was reasonably fit for purpose. If the service provided failed to meet the guarantee of fitness, I must then consider whether the defect is remediable or substantial. If the defect is remediable, XD Ltd must be given the opportunity to remedy. If the failure cannot be remedied, or is substantial, then I must consider what remedy is reasonable.
19. Substantiality is broadly defined in s 36 CGA as when "*the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure*". However, a degree of robustness when dealing with disappointment must be inferred in a reasonable consumer.
20. For defects to be considered damage for which a remedy is owed, it must be possible to show that there is a flaw which affects the amenity of the particular feature be considered. For instance, polished concrete flooring has a practical value; providing an easily cleaned and robust floor surface, and an aesthetic value; providing a modern stylish look. The same concrete slab if left unpolished, as a garage slab, or carpeted, has the same practical value as a polished floor but has less or no aesthetic value. Therefore, a visible but minor flaw in a concrete slab is damage if the slab is polished, is not damage if carpeted, and in the case of a garage slab will be a question of fact and degree.
21. The proportionality of any remedy must be considered. The case of *Ruxley Electronics v Forsyth*¹ is instructive. In that case a swimming pool was built a foot shallower than had been contracted for. The homeowner sought to have the pool demolished and rebuilt in its entirety at a substantial cost. The court took the view that the cost of the remedy outweighed the loss of amenity suffered by the homeowner, instead awarded damages for loss of amenity at a considerably lower level.

Heat pump

22. XD Ltd installed concrete pads for the installation of hot water cylinders. This work was done in March/April. Around the same time the copper pipes which were in place for the installation of the heat pump were knocked and bent causing the pipes to crimp. The pipes required replacement at a cost of \$2,579.06.

¹ *Ruxley Electronics v Forsyth* [1995] 3 ER 268

23. QC says that XD Ltd must have caused this damage as, in his view, XD Ltd employees were the only trades on site when the damage occurred. He believes this due to comments made to him by the other trades, who all denied causing the damage. XD Ltd denies that it caused the damage and claims that when the pads were being installed the plumber and various other tradesmen were on-site.
24. QC's argument seems to be that XD Ltd's denial of the damage cannot be trusted as XD Ltd has denied liability for other issues. This is not a persuasive argument.
25. As QC is alleging the damage, the onus is on him to prove causation and liability. He must show it was more likely than not that XD Ltd was responsible for this damage. He has not done so. Therefore, I must dismiss this aspect of his counterclaim.

Sewer pipe

26. The sewage pipe was damaged by XD Ltd when auguring to install retaining posts. The holes were originally hand-dug to 600mm but then the pipe was hit at 900mm when using a powered auger.
27. XD Ltd has admitted that it caused the damage. However, it seeks to rely on a clause in the contract which requires that the QC provides copy of site plans and says that had it copies of those plans the damage would not have occurred. QC says that he did provide a site plan on which the pipes were marked.
28. I cannot reconcile the differences between two positions about whether the plans were provided or not. However, I do not accept that the contractual term cited by XD Ltd provides a defence against liability for the damage. XD Ltd is under an obligation not to cause damage. Standard industry practice is to hand dig before using a machine if it is suspected that pipes are present in an area. Whilst this partially occurred, the onus is on XD Ltd as a contractor doing earthworks to make sure that in that buried services are not damaged. I do not accept that XD Ltd fulfilled its obligations in this regard. Therefore, the additional sum charged by XD Ltd for the damage to the sewer pipe; \$150 (plus GST) is to be deducted from the outstanding invoice amount.

The path width variation

29. The pathways around the perimeter of the house were widened to 900 mm and were widened around the heat and hot water cylinder pads. XD Ltd says this was done due to an oral request made by QC to two XD Ltd employees on 12 April 2023. QC says that he asked for the widening, but only if there was no additional cost, which he says was made clear to the employees.
30. It is open to a party to a contract to vary their agreement if this is accepted by the other party. XD Ltd's employees were able to agree to a variation to the contract. There is a difference in evidence about whether QC made it clear the work would only be done if there was no original cost. However, the terms of contract allow XD Ltd to increase its charges if a client requests a variation which increases the cost of the works. I cannot resolve the difference in evidence and, therefore, the written contractual term allowing for an uplift in cost due to the variation must prevail. Therefore, I must dismiss this aspect of QC's counterclaim.

The fall of the paths

31. QC alleges that the paths have insufficient fall away from the house. The evidence is that paths should have a 2.5° fall away from the house. QC has provided photos showing water pooling in two locations. I do not accept that this is evidence that the falls are incorrect.
32. A 2.5° fall does not ensure that water will flow rapidly away on brush finished external concrete. None of the evidence provided shows the actual fall angle of the paths. The photos show minor pooling occurring only in two relatively small areas. I cannot conclude from this that this is a defect which requires remediation.

33. Therefore, I must dismiss this aspect of QC's counterclaim.

Rough finishing

34. QC has alleged other defects relating to the finish of the concrete works, including that the edge of the driveway slab has a slight curve to it, that the pad under the heatpump is rough, that there is rough finishing around driveway channel drains, and that those drains have insufficient fall towards sumps. As with the fall of the paths QC has supplied photos. I will deal with these issues in turn.

- a. The slight curve to the edge of the driveway slab is minor. This section of slab is several metres long and curve can only be seen due to the fact the photo was taken at almost ground level. This is not a defect which requires remediation.
- b. The pad under the heat pump has some cement smears on it however, these are minor and cosmetic. Outdoor concrete paving is a functional component with minimal aesthetic value. The smears are not significant enough to constitute a defect.
- c. The finishing of the concrete around the driveway drains has some minor cosmetic defects. However, I cannot conclude that these are significant defects which affect the amenity of the driveway.

35. None of the rough finishing defects alleged have been made out, therefore, I must dismiss these aspects of QC's counterclaim.

Driveway drainage channels

36. QC alleges that the driveway drains, which are 4 m long, should be 6 m as that is the length of the driveway, and are incorrectly installed with insufficient falls to the sump. The evidence of the need for longer channels are repeated comments from other landscapers to whom QC has spoken. However, I cannot admit hearsay comments as evidence. Furthermore, I note that the section of the driveway closest to the road has a slight slope and drains to the part of the driveway in which drainage channels are present. There are no site plans, or other evidence, showing that XD Ltd was instructed to install more than 4 m of drainage channel.

37. The photos show the driveway drainage channels have some water pooling in them, which suggests insufficient falls to the sump. I note for instance in the photo of the uphill end of the drain, that rain has pooled at one end of the channel. However, it is impossible to see if there is any depth to this pooling. The photo of the middle section of the channel shows the drain is largely dry but for a small section with minor pooling of water. These defects are minor and do not affect the amenity of the driveway. Therefore, I must dismiss these aspects of QC's counterclaim.

Retaining and lawns

38. QC has alleged that the soil in a lawn area next to retaining installed by XD Ltd was not properly compacted and lacks drainage. He also alleges that the retaining did not have drainage installed behind it. The evidence of these alleged defects are photos showing a muddy section of lawn with water pooling in footprints.

39. QC has produced no evidence that drainage was not installed behind the retaining. Therefore, I cannot consider this aspect of this claim.

40. With regard to the lawn areas, I note that the estimate for retaining includes:

*Start backfilling ensuring drainage is put in at the same time. Compacting as you go.
Spread around any leftover soil to be used as garden. And dispose of excess.*

Supply and grade topsoil in the entire area ensure to compact lightly. Supply and sow grass seed to all topsoil.

41. I note that the grass in the area appears to have grown reasonably well given that the work was completed in Autumn and the photos taken in Winter. The quote does not include drainage for lawns beyond grading of the soil (levelling with some fall) and I cannot conclude from the evidence that this has not been carried out. At most it would appear from the photos that this area may not have sufficient grade. However, the evidence does not strongly support a contention that this work was not correctly carried out. QC has not proven this claim, and I must dismiss it.

Cladding clearance

42. The paths around the perimeter of the house were installed with a clearance of 40 to 60-mm to the bottom of the cladding. A code compliance certificate has been refused by [redacted] City Council, as the Building Code and Building Consent require a minimum of 100 mm clearance between paving and the bottom of cladding. The 40 to 60 mm clearance does not meet the consenting requirements for the building.
43. The loss here is more than a loss of amenity, as there are insurance ramifications for damage resulting from the non-compliance, and also potential issues with QC's mortgage funding. Therefore, remediation is necessary.
44. XD Ltd has accepted that the lack of clearance needs to be remedied and has proposed cutting slot drains in the paths to provide sufficient clearance. Correspondence provided shows that QC initially accepted this offer, but negotiations stalled as he refused to pay XD Ltd's invoice, and XD Ltd would not carry out the work until the end was to be paid.
45. Subsequently QC seeks that the paths are demolished in full and rebuilt. He has provided various estimates for this work which set the price between \$12,397 and \$42,786.37. I cannot find that demolition and rebuild is a justified or reasonable response to the issue. QC's main reason for seeking the demolition of the paths appears to be aesthetic. However, the aesthetic value of uncoloured, brush finished concrete paths is relatively minimal. I do not believe that the installation of slot drains will affect amenity in a significant way.
46. This means that these cutting of slot drains is the appropriate remedy in the situation. XD Ltd has provided its own internal costings of doing the work which is effectively labour and materials only with no profit margin is \$813.68.
47. QC has also provided costings for cutting slot drains to be filled with drainage metal and stones for \$5,290, and \$23,541.12 for the installation of PVC drain liners.
48. An ideal world XD Ltd would go back on site and install the slot drains at its own cost. However, I do not believe that the relationship between the parties is such that this will provide a lasting and final resolution. Therefore, the most reasonable resolution is an award of damages on the basis of the quote QC has provided for the installation of slot drains filled with drainage metal and stones, from [Landscaping company]. There is also the cost of an additional Council inspection fee of \$500. Therefore, I award \$5,790 to QC.

Other costs and damage, and total award

49. XD Ltd claims \$12,095.63, for its unpaid invoice. Non-payment was a breach of the contract, both in terms of the terms and conditions, but also in terms of the Construction Contracts Act 2002. However, I found above that this must be adjusted for the cost of the repair to the sewer pipe, and for the cost of remediating the cladding clearance issue. Additionally, the invoice includes \$833 (GST excl) as an internal administration fee, which appears to relate to time spent on issues which are the subject of this dispute, and therefore is a cost barred by the Disputes Tribunals Act.²

50. I order that the invoice will be adjusted as follows:

\$12,095.63 Invoice INV – 0374

² S 43 Disputes Tribunals Act 1988

LESS

\$957.95 administration fee

\$172.50 sewerage pipe repair

\$5,790.00 cladding clearance damages

TOTAL

\$5,175.18 to pay

51. In his counterclaim QC has claimed mortgage interest, legal costs, costs relating to accommodation, and general damages for suffering.
52. Interest cannot be awarded in this situation as the outcome is that QC must pay a portion of the outstanding invoice. The costs relating to accommodation appear to come from lost rental for the granny flat, which I understand is on the same property as the house. These are not reasonably foreseeable losses arising from the contract and so cannot be awarded.
53. QC's legal costs, as with XD Ltd's costs, were incurred on issues which are the subject of this disputes and cannot be awarded.
54. The general damages are claimed for suffering which has occurred in a situation where both parties sought to stand on their legal rights. I found above that, apart from the cladding clearance issues and the sewerage pipe damage, the alleged defects were not made out. The sewerage pipe damage was a minor issue, and the remedy for the cladding clearance was the solution proposed by XD Ltd in June 2023. As a result, QC's suffering was as much a result of his own actions, as it was of XD Ltd's actions. Therefore, no award of general damages will be made.

Referee: C D Boys

Date: 7 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>.