IN THE DISPUTES TRIBUNAL **[2018] NZDT 1133**

BETWEEN	**HLL Ltd** APPLICANT
AND	**RO and LR as Trustees of the OL Trust** RESPONDENT
Date of Order:	6 July 2018
Referee:	Referee: J Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that Mrs RO and Mr LR, as Trustees of the OL Trust, are to pay to HLL Ltd the sum of $6,504.12 on or before 30 July 2018.

Facts

[1] Mrs RO and Mr LR, as Trustees of the OL Trust (the Trust) own a commercial building at XX Y Street, Z Suburb. In February 2010, the Trust engaged HLL Ltd (HLL) to re-roof the building with Zincalume Colorsteel and to reseal existing butynol internal gutters. As set out in a quote dated 3 March 2009, this work was to be carried out for a fixed price of $37,395.00. Of this amount, the sum of $2,250.00 was for resealing gutters, which did not go ahead. The total contract price for the re-roofing on its own was $35,145.00.

[2] The work was completed in June 2010. The Trust has made payments of $18,312.50. However, the parties have been in dispute since that time about the job, and the balance of $16,832.50 remains outstanding.

[3] The dispute has an unusually protracted history. Not long after the roofing work was completed, OL Trust filed a claim seeking compensation of $15,000.00 for poor workmanship and damage to the building. HLL filed a counterclaim for $15,000.00 for the sum outstanding. The claims were transferred to the District Court in 2011, but were not pursued in that forum. The Trust re-lodged the claim in the Disputes Tribunal in 2014, but for an unknown reason, the claim was not heard until December 2015. Again, it is not clear why the matter was delayed, but there was no substantive hearing of the claim until February 2017. After three hearings, a decision was made on 23 October 2017 that OL Trust owed HLL the sum of $15,000.00. However, due to ill health, Mrs RO had been unable to attend the final hearing, and she filed a request for a rehearing. This was granted. The matter therefore started afresh before me in early 2018.

[4] Mrs RO advised the Tribunal during 2017 that her claim had been withdrawn. It is not clear that she intended that consequence, but in any event, it has been accepted that her rehearing application re-opens all matters. As can be seen from what ensues, only that part of her claim that defends HLL's claim can succeed, so nothing turns on any technicality regarding the status of her own claim.

Issues

[5] The issues to be resolved are:

a. whether the roofing work was carried out with reasonable care and skill;

b. If not, whether the failures were substantial;

c. If so, how much is owing under the contract?

Was the roofing work carried out with reasonable care and skill?

[6] By virtue of s28 of the Consumer Guarantees Act 1993, the work on the roof was required to be carried out with reasonable care and skill.

[7] Having considered all the evidence of both parties to be presented about the matter, and had the benefit of hearing the direct evidence of those involved in the roofing work, including two reports from RealSure, I am satisfied that the roofing work does not comply with the s28 guarantee. This is so for two reasons.

[8] The first is that the work was undertaken in a storm, which caused some degree of damage to carpet and ceiling tiles inside the building. I have had regard to HLL's evidence that it could not have started the work before the winter set in, having waited until the deposit was received to buy the materials, and then having to wait for these to arrive. I accept that these delays were not unreasonable given the sequence of events. However, HLL was in sole command of the decision to remove the existing roof, and how the roof replacement took place. I am satisfied, having heard the evidence of the weather at the time, and the extent of the damage inside the building, that decisions were made to proceed with work on days that compromised the building, and that damage ensued. The work should have been delayed further so that so much rain did not get in. Regrettably, after waiting since February to get the work underway, Mrs RO had sent a fax on 25 May cancelling the job, as she was concerned the weather would close in, but she was a day too late. HLL replied that it had just started, and Mrs RO allowed the job to proceed. Her cancellation at that time was accordingly ineffective.

[9] Secondly, I am satisfied that the roofing work was not completed to an adequate standard. When the weather turned nasty and the work still proceeded, Mrs RO locked HLL out of the building for a time as a protest against the damage being done from the rain coming in. However, this was no defence to the assertion that the work was defective. Mrs RO did give HLL access to finish the work, and the manager's evidence was that the work was completed, and that this was confirmed to Mrs RO, by the time the workers left the site. At that point, it was incumbent on HLL to have completed its work to a proper standard. However, the resealing of the gutters never took place. Consequently, no sum can be claimed for the cost of that, but no consequences from any leaking gutters since that time can be viewed as related to the work done.

[10] The following failings have been identified by RealSure with the work. The same failings were also noted in an architect's report from July 2012, but as that person was not identified for the proceedings, and did not give evidence, this report was set to one side.

[11] First, the Tasman underlay used was light. This was not on its own proved to be a breach. The Tasman specification sheets show that it is a light product, and Tasman generally recommends medium weight for commercial use. However, this does not mean that the lighter weight product was unsatisfactory, as it can be used in some circumstances. However, the paper was not properly installed. There were insufficient laps in places, holes developed, and it was inadequately supported by old netting, which had rusted in places, and should have been replaced. Some older underlay remained and an area of 7x6m2 was also missing altogether. HLL stated that the netting was excluded from the contract. This may be so, but a handwritten comment by HLL on a fax sent by Mrs RO in February 2010 about this confirmed that HLL had given advice not to replace it. The weight of evidence was that the failure to replace it compromised the underlay, and was a failure.

[12] Secondly, there were a range of other issues surrounding overtightened fixings, sheeting not turned down at the ends, opaque sheeting not turned up at the roof ends under the ridge flashings, no foam closure strips, and flashings either missing or incorrectly installed.

[13] The gutters were also identified as requiring work, but as HLL did not proceed with this work, they could not be responsible for this. HLL also pointed out that the reports noted loose material in the gutters, which, if allowed to block them, will cause overflow.

Were the failures substantial?

[14] Where a breach is established, a customer is entitled to the remedies set out in s32 of the Act.

[15] Where a failure is minor, or can be rectified, the remedy is one of repair, or, if this is not carried out, the reasonable costs of repair elsewhere (s32(a)). However, where there is a failure to repair, or the failure is substantial (s36), there is also a right to cancel (s32(b)). Cancellation entitles a refund of sums paid (s38), unless there is some value retained in the work done (s39(4)). In either case, there is a right to reasonably foreseeable consequential losses (s32(c)).

[16] I am satisfied the failures were substantial. The Act considers a breach to be in this category if a reasonable consumer would not have proceeded with the work had they known what would ensue (s36). There was sufficient damage caused, and errors made, that this test

is met. The roofing work can be repaired, but this is a difficult and time-consuming task that could cause damage to the roofing iron.

How much is owing under the contract?

[17] Given that substantial failures occurred, Mrs RO is entitled to a refund of all sums paid unless it is established that she has received some value from the work (s39). She is also entitled to remedial costs (s32(c)).

[18] It is clear in this case that Mrs RO has received the benefit of substantial materials left in the roof that she has retained. RealSure was of the view that the iron is satisfactory and can remain. Despite problems with the installation, she would not be able to get a refund on the cost of that, only on the workmanship.

[19] However, it was established that the iron will need to be lifted to enable full replacement of the paper and netting. It was not clear how long this would take. HLL stated that this would be 2-3 days for two men, but this seemed too short a time frame, and no quote was provided by either party. RealSure made the point that it will be hard to find anyone to come and do the work, and a premium will be charged given the risk of damage to the iron. It is better in these circumstances to invoke Mrs RO's right to a refund the labour already expended. HLL advised that the labour component was in the order of $7,000.00 (give or take $1,000-$2,000). In the circumstances, I am satisfied that this figure should be deducted by way of refund as the likely expenditure from which there was little or no benefit in the original contract. This leaves the Trust paying for the materials, which remain with the building. It is possible some of those materials, such as caps and flashings, and even some iron, will need to be replaced if it is damaged in re-doing the roof. However, this cannot be assessed at this time, and that is now a risk to be taken by the Trust. The higher assessment of the labour is considered reasonable in those circumstances.

[20] I am satisfied that the decision to proceed in such bad weather in June caused damage to the upstairs carpet. A quote of $6,525.00 was presented to show the cost of replacing this. The carpet was at least 6 years old at the time the roof was replaced. Whilst it is another 8 years old, it has not had another 8 years of wear, as the building has been vacant. The carpet was good quality and not heavily used. However, the last tenant in the building confirmed it was damaged by leaks before the roof was replaced, at least in one corner. Leaks have also continued over the years since, and there was insufficient evidence that the carpet was destroyed, or could not have been dried, at the time. Part of the damage may also be related to the leaking gutters, for which HLL is not responsible. Having regard to the evidence

that could be presented, acknowledging other causes, and taking into account betterment, the sum of $1,875.93 (25%) is awarded towards the carpet replacement.

[21] Ceiling tiles were also damaged. The last tenant in the property confirmed that some were damaged from previous leaks before the roof was redone. HLL confirmed there were 17 damaged by the end of the job, but that these would have been pre-existing. Again, there was insufficient evidence that water ingress from the roofing job was entirely to blame, but it is probable that some damage was done. The sum of $566.95 (50% of the cost of replacement) is awarded as a contribution to this outlay.

[22] The sum of $851.00 was paid to KP Roofing Ltd in 2014 to undertake remedial work on sheet turn ups, flashings, and cleaning gutters. The latter was not related to the roofing contract, but the first two items were. A deduction has been made that is considered reasonable for the gutter cleaning. The sum of $425.50 (50%) is awarded for this work.

[23] It was established that the underlay will need to be replaced at a likely cost of approximately $400.00, which, allowing for GST, approximates to $460.00. This sum is awarded as a further deduction, as the amount spent on the original paper is of no value. The cost of new netting was not included in the first contract, and therefore is not a consequential loss.

[24] Mrs RO claimed loss of rent over many years, plus rates and insurance. Along with other costs of progressing the claim and maintaining the building she places her loss at $840,000.00. However, no other costs are recoverable. The existing tenant had wanted to stay whilst the re-roofing was undertaken, but the Trust decided to end the lease. Once the roofing work was done, the Trust had a duty to mitigate its loss, repair any defects, or bring forward its claim against HLL for repair of these, in 2011. The delays since then cannot be attributed to HLL.

[25] Consequently, out of the $16,832.50 left to pay, there are deductions to be made of $10,328.38. This leaves the Trust with a debt to HLL of $6,504.12.

[26] I accept that there will be inaccuracies in these calculations, and there have had to be difficult judgments made about contributions to events that happened many years ago, and that are now difficult to quantify. Both parties allowed the case to languish over many years, and must now accept the problems that can consequently result in assessing the evidence so long after the event.

[27] Notwithstanding these issues, I am confident that this outcome represents a reasonable assessment of the substantial merits and justice of the case. The roofing work was not completed to a reasonable standard. This order leaves the Trust with a refund of the labour under the original contract that can now be put towards repair work, and also a contribution to consequential losses. On the other hand, it entitles HLL to a further payment to put towards the sums it expended on materials that will remain with the building.