(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2020] NZDT 1440**

APPLICANT / COUNTERCLAIM RESPONDENT	**MN Ltd**
RESPONDENT / COUNTERCLAIM APPLICANT	**QN & EN**

The Tribunal orders:

QN and EN are to pay MN Ltd $10,367.46 on or before Friday 14 May 2021 and this sum shall address in full the claim and the counterclaim.

Reasons:

1. QN and EN hired MN Ltd to carry out landscaping works around their pool. The agreement was later varied to include an extension to the roof over a decked area. QN and EN were unhappy with the time and cost to carry out the work and choices of materials used. They ended the agreement and did not pay the full sum invoiced by MN.

2. MN Ltd claims $25,533.74 from QN and EN in relation to the unpaid invoices.

3. QN and EN counterclaim $8,000 from MN Ltd in relation to the service carried out and costs of reinstatement.

4. The counterclaim relies on the same set of facts as the claim and the issues will be considered in the context of both the claim and the counterclaim, with consideration at the end as to whether the counterclaim is made out independently of the claim.

5. As a preliminary matter, an issue raised was whether the contract was subject to the consumer remedies for residential building work (Part 4A) under the Building Act 2004. Section 362C of that Act provides that nothing in that part derogates from the Consumer Guarantees Act 1993 (**CGA**). Therefore, if the claim and counterclaim are addressed under the CGA, there is no need to determine the extent to which the consumer remedies for residential building work apply.

6. It is also noted that at the hearing there was discussion of application of the provisions relating to breach of contract under the Contract and Commercial Law Act 2017. On reflection, as the CGA applies to the services it is more appropriate to apply those provisions to both the claim and counterclaim.

7. Therefore, the issues to be determined are:

a) Do the guarantees related to services being carried out within a reasonable time and at a reasonable price apply to the contract?

b) Were the services carried out with reasonable care and skill?

c) Is MN entitled to the sum claimed?

d) Are QN and EN entitled to the sum counterclaimed?

Background

8. In or around August 2018 the parties entered an agreement to carry out the works, which commenced in or around the start of October. The parties agree that it was a design and build project.

9. The scope of the works included: site preparation; approximately 45sqm extension to existing decking around the pool; landscaping between the pool area and the house; a new pergola/pool house; removal and reinstatement of fencing of approximately 40sqm in horizontal boards; and a new pool pump shed. It is disputed between the parties whether other fencing was included in the scope of works.

10. MN say the project involved major site preparation. It says the ground was very wet and the work involved laying new drains from the main road and digging up large tree stumps and roots. It also says that the area around the pool had poorly installed pool piping that had been leaking, which it needed to rectify before working in that area. It also says the existing decking was not level and needed to be squared up before the decking extension could be done.

11. MN says the designs and instructions changed throughout the job, adding time and cost. For example, MN say that after preparing boxing and ordering concrete for the area between the pool and the house EN decided she wanted timber decking in that area. EN disputes this and says she never wanted concrete in that location.

12. EN raises issues as to how time was spent on site and the number of trips for materials. She also says she was not asked about issues such as materials to be used for roofing over the pergola and the decking extension, both of which she says now need to be replaced.

13. There appears to have been a breakdown in communication between the parties, which may have been exacerbated by the absence of QN and EN for periods during the works and limited time on site by MN's Director, Mr S, who was responsible for the contract for MN (from the hours given it appears he was on site for approximately 16 of the 482 hours recorded for all staff).

14. After commencement a further job was added, which was to extend the roofing over a raised deck, including replacement of the clearlite roofing and retaining work. It is understood both parties agree that this work was not included in the initial quote.

15. MN say it quoted $45-$50,000 plus GST for the work (excluding the extension to the deck roofing). EN says the quote was $40,000 but she was unsure whether this included GST ($46,000 with GST).

16. MN say EN gave a completion date of 30 November 2018 and then notified in an email on 29 October 2018 that the completion date was being brought forward to 9 November 2018. EN says the completion date was always 9 November 2018. The email says, "I just want to confirm with you that the last day here will be the 9th November…", which may support that she was reaffirming the completion date.

17. MN charged $59,664.60 for the work carried out. QN and EN paid $34,130.76. The balance makes up the claim.

18. It is understood $11,514.88 is attributable to the deck roof extension. Therefore, the total invoiced for the work around the pool was $48,149.72.

19. However, the work was not complete on 9 November 2018. The works remaining included: bracing and installation of barge flashings on the pool house structure; a 12sqm area of unfinished decking; the pool pump shed; and the area between the pool and the house.

20. When the payments went into arrears the relationship deteriorated to the point where MN visited the site before Christmas 2018 to remove materials, including decking that had already been laid. Some of the outstanding work therefore relates to the removal of such items, rather than work being incomplete.

21. An independent expert was engaged to establish the value of the work carried out. The overall value of the work estimated by the assessor was $34,730 including GST (excluding the roof extension above the deck). In relation to the report it is noted:

    a) Site preparation is excluded from the assessment (it can't be seen);

    b) Remedial work is accounted for in the overall estimate (excluding the pool pump shed);

    c) The timeframe for the work is estimated to be 3 – 4 weeks, given fine weather and materials (including the extension to the roof over the deck);

    d) The estimate uses 2021 costings, but a 20% deduction is made for the increase in prices since 2018, which the assessor says is based on analysis in a building magazine of price variance;

    e) Each price estimate includes a supervision margin of 15% and a contingency sum of 20% is added to the overall build cost; and

    f) The estimate for the extension to the roofing over the deck and associated retaining work is $9,133.22, allowing for 54 hours of labour, which the assessor said in questioning was a generous allocation.

22. MN say that 30% of the materials used were not reflected in the estimate given and that there is a corresponding labour cost to those additional materials. It also gave evidence that at least one of the materials used has decreased in price, not increased.

Do the guarantees related to services being carried out within a reasonable time and at a reasonable price apply to the contract?

23. This claim concerns a contract for the supply of services. The general law of contract applies. A legally binding contract is formed when both parties intend to contract on agreed terms and intend for those terms to be legally binding. The terms of a contract are formed at the beginning, not at the end. What was agreed is looked at objectively, i.e. by looking at what was said and done. The law of contract requires parties to a contract to adhere to the terms of that contract unless there is a legal reason not to do so.

24. The CGA also applies to this contract. The CGA implies into all consumer contracts a set of minimum standards (guarantees) for goods and services when they are supplied in trade to consumers.

25. A consumer under the CGA includes a person who acquires services ordinarily acquired for personal, domestic or household use. Even if the services are acquired by a consumer in trade, the provisions of the Act continue to apply unless expressly excluded in a written contract (s 43). Household maintenance and renovations are services ordinarily acquired for personal, domestic or household use, and therefore QN and EN are consumers.

26. Sections 30 and 31 of the CGA provide that where services are supplied to a consumer there is a guarantee that the service will be completed within a reasonable time, and that the consumer is not liable to pay more than a reasonable price, when the price or time for the service is not: fixed or determined by the contract, or left to be fixed or determined in a manner agreed by the contract, or to be determined by the course of dealing between the parties.

27. The question here is whether the price and timeframe were determined in the contract.

28. According to both parties, a price estimate was given for the work, which became a term of the contract, but there is a conflict on what that price was. Nevertheless, the price was determined by the contract.

29. An 'end date' was identified in the contract. Again, the difficulty is that there is disagreement as to when that date was. Nevertheless, the time for completion was determined in the contract.

30. I therefore find that the guarantees relating to the services being carried out within a reasonable time and at a reasonable price do not apply to the contract as those matters were determined, even though there was ambiguity in the agreement.

Were the services carried out with reasonable care and skill?

31. Section 28 of the CGA provides a guarantee that a service will be carried out with reasonable care and skill.

32. MN says the service included design as well as construction. It is not unreasonable to expect that a landscaping design would include a drawn plan. There was no documentation of the design plan in words or pictures.

33. MN say that EN had trouble visualising an outcome and that it had to spend time mocking up what the plan would look like. Understanding and visualisation may have been aided by the production of drawings for the plan.

34. A drawn plan, with detail as to materials to be used, would have gone some way to avoiding the disagreements that eventuated over: the scope of the works (whether the other part of the fence was included); the instructions (whether concrete or timber was intended between the pool area and the house); and the materials (the colour of the roofing for the pergola).

35. In taking responsibility for the design element of the project, it was incumbent upon MN to ensure this was presented in a way where there could be some certainty as to the instructions.

36. I therefore find that the lack of documentation for the design element of the service is a failure to carry out that part of the service with reasonable care and skill.

37. In addition, whilst the limited communication over the deadline and pricing means that those matters were to some extent determined in the contract, the level of uncertainty around these fundamental contractual terms is of concern.

38. In certain circumstances, a failure to keep a consumer informed of the costs of the work might in itself be a separate breach of the guarantee of reasonable care and skill under section 28 of the CGA. Likewise, in my view a failure to draw a plan when responsible for design, to write down a price estimate, and to give a timeframe may each be separate breaches of the guarantee of reasonable care and skill depending on the circumstances.

39. MN priced the job at the higher end of the estimate at $57,500 (incl. GST), without the roof extension. It says that it gave a discount to its labour charge due to the size of the project, so it acknowledged that this was a project of reasonable scale from the outset. Following commencement, the project was extended to include the roof extension, with no communication as to the effect on price and timeframe.

40. The assessor understood that the work needed to comply with Part 4A of the Building Act, meaning a contract was mandatory due to the value of the work. Having considered the definitions of "residential building work", "building work", "building" and "household unit" in that Act, I am not entirely persuaded that the provisions of the Act apply to these services, but I accept that it is arguable that they apply.

41. The roof extension is for a building that is used as specialised accommodation and not for a household. The pool area may be part of a building used as a household unit, so may qualify as residential building work. In any event, there is a thin line as to whether the services are captured by the provisions. If captured, a contract in excess of $30,000 (including GST) must be written and meet the requirements of the Act, and there is a penalty for non-compliance.

42. That is at least indicative that a contract of the value and nature of this work should be documented.

43. It is accepted that it is difficult to quote for what you can't see, but that doesn't absolve the responsibility to provide a quote (and to limit the parameters). Indeed, a quote was given notwithstanding the site issues. It just wasn't given in writing.

44. It is also accepted that QN and EN chose to enter a contract without anything in writing or any drawn plan. That was a risk they took, and they too must bear some of the consequences of that decision.

45. It is also acknowledged that the quality of the work has largely not been the focus of the dispute between the parties.

46. However, the lack of documentation has been a failing of such a degree that it is almost difficult to know with any certainty the fundamentals of the contract terms. This in itself could lead to a finding that there is no contract because there is insufficient certainty of terms.

47. I am therefore satisfied that the failure to properly document the project in writing or in pictures, in relation to the design, scope of works, and price, was a failure to carry out the service with reasonable care and skill.

48. For this reason, I find that the service was not carried out with reasonable care and skill.

Is MN entitled to the sum claimed?

49. Where a service fails to comply with a guarantee, if the failure cannot be remedied, the consumer is entitled to cancel the contract, or to damages in compensation for any reduction in value of the service from that charged, and for any resulting loss or damage to the consumer that was reasonably foreseeable as liable to result from the failure (s 32(b)/(c), CGA).

50. The failure is not related to rectification of specific works but to the underpinning of the contract and as there has also been a deterioration in the relationship between the parties, I am satisfied that this is not a case where the failure can be remedied.

51. QN and EN may cancel the contract and that cancellation may be deemed to have taken effect on 9 November 2018 as the final day of works (s 37, CGA). Under section 32 of the CGA, QN and EN are entitled to a reduction in the charge for the services that equates to the loss in value and to consequential loss. That right is not affected by cancellation (s 38(2), CGA). When applied here, the loss in value relates to unfinished work and work to be rectified.

52. It is necessary to first establish the value of the work carried out and the work remaining. The assessor's report is the basis for that task.

53. Because the value is based on the assessor's estimate and not the sum quoted or invoiced, it is not necessary to determine whether the quote was $40,000 or $45-50,000 plus GST.

54. MN dispute the assessor's figures as noted in paragraph 22. However, allowance is made in the assessor's estimate for a supervision fee and for a contingency sum. As the estimate excludes the site preparation and pump shed, it is also not too far from the quote given by MN for the work (especially as MN attribute site preparation to much of the cost accrued.)

55. The assessor valued the pool areas works at $34,730. This includes deductions already made for incomplete work or work to be rectified. It doesn't include site preparation, or a new pool pump shed.

56. QN and EN paid $34,130.76 (n.b. part of this was for the roof extension). Therefore, in relation to the pool works, the amount outstanding is $599.24.

57. I am aware that the site preparation is likely to cost more than the pool pump shed, although it is difficult to ascribe a value to either on the current evidence.

58. Where a consumer cancels a contract, the Disputes Tribunal may make an order directing one party to pay another (s 39(2)(c), CGA), having regard to matters such as the benefit and value of work carried out (s 39(4).

59. In additional compensation for the site preparation work on top of the setoff of the pump shed, I am prepared to order that a further $2,000 is payable for the pool works.

60. The assessor's estimate for the roofing extension was $9,133.22. EN gave evidence that the sum invoiced for this work was $11,514.88. This did not appear to be challenged by MN. Although this sum was invoiced and paid, that payment has been attributed to the pool works above, with the effect that no payment has been made for the roofing extension.

61. Therefore, $9,133.22 is payable by QN and EN for the roofing extension.

62. Section 32 allows for loss resulting from the failure that was reasonably foreseeable. The costs of the assessor's report, which was borne by QN and EN, is a direct consequence of the dispute between the parties and the failure to set out the contract properly. Therefore, the cost of the expert report of $2,730 should at least be shared equally between the parties. For that reason and pursuant to the discretion to grant relief under s 39, $1,365 is deducted from the sum to be paid to MN.

63. The sum owed is: $599.24 + $2,000 + $9,133.22 - $1,365 = $10,367.46.

64. For these reasons I find that MN is not entitled to the sum claimed but is entitled to the lesser sum of $10,367.46.

Are QN and EN entitled to the sum counterclaimed?

65. The counterclaim by QN and EN rests on the same facts, law and assessment of value. It would have stood on its own as an independent claim, but in the event the counterclaim has been dealt with in the manner of a setoff applied to the claim of MN.

66. It is understood that EN's position at the hearing was that she accepted the assessor's value of the deductions as an appropriate way to address the costs itemised in the counterclaim.

67. For these reasons, QN and EN are to pay MNMN Ltd $10,367.46 by the date stated in this order.

Referee: **T Baker**
Date: **27 April 2021**

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 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 days of the decision having been made. There is a $200 filing fee for an appeal.
You can only appeal outside 20 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.