IN THE DISPUTES TRIBUNAL **[2014] NZDT 723**

BETWEEN	**DM** APPLICANT
AND	**VN TRUSTEES LIMITED** RESPONDENT
Date of Order:	31 October 2014
Referee:	Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that VN Trustees Limited as trustee of AA is to pay the sum of $6,182.40 directly to DM trading as ABC on or before 28 November 2014 and the counter claim is dismissed.

Facts

[1] DM, trading as ABC, was engaged by VN Trustees Ltd ('VN'), as a trustee of AA, in mid 2012 to prepare drawings for a bach VN wanted to build near Z. DM had been recommended by DEF, a company that VN had engaged to build the bach, which was to be built off-site and brought onto the coastal site complete.

[2] DM prepared a written proposal dated 16 July 2012 in which he outlined the brief and the costs involved to prepare documentation to building consent stage. This proposal was not signed by VN but a letter of authorisation from VN allowing DM to lodge applications for land and building consent was provided on 7 August 2012. The work appears to have proceeded more or less in accordance with the terms in the written proposal with a couple of plan revisions along the way based on changes by VN. Resource consent (the bach was in a coastal zone) was the responsibility of DEF initially but was taken over by DM when DEF folded, a short time into this work.

[3] DM prepared resource consent and building consent documentation. Resource consent was issued 10 November 2012 and a building consent was issued in February 2013. Over this time, DM rendered three invoices, in line with his initial fee proposal and was paid in full.

[4] In about March or April 2013, VN approached DM again, having decided to build a larger building on the site. VN director, BB, had apparently discovered that a resource consent for a bigger building was achievable if it was built as travellers' accommodation. The required plan changes were too great to apply for an amendment to the existing consents so DM was asked to prepare plans for a new building consent. The resource consent was this time to be prepared by a third party.

[5] There was no written proposal, brief or fixed costs agreed for this second job. A new resource consent was issued on 23 July 2013, and a new building consent in September 2013.

[6] DM issued an invoice for $2,760.00 on 11 October 2013 (for the period March to June 2013) and a final invoice for $3,422.40 on 7 May 2014 (for the period June to August 2013). Neither of these invoices has been paid by VN and DM claims their total of $6,182.40.

[7] VN counter-claims on the basis that DM's services were not performed with reasonable care and skill and that the design provided has resulted in additional building costs and other losses including time delays. It claims the losses suffered total $50,000.00 (amended at the hearing from the $75,000.00 stated in written submissions), being $20,000 related to a support beam, $20,000 additional building costs arising from the designed floor being wooden, not concrete, and $10,000 for other issues such as the kitchen window relocation and delays. The counter-claim is reduced to $15,000.00 to fall within the monetary jurisdiction of the Disputes Tribunal.

[8] The relevant law is the general law of contract and the Consumer Guarantees Act 1993 ('CGA'). As discussed at the hearing, the Tribunal's jurisdiction in negligence is restricted to damage to or loss of property so does not include economic loss resulting from professional negligence. The counter-claim will therefore be considered under the Consumer Guarantees Act 1993, which applies because the preparation of plans, for what is essentially a residential dwelling (albeit one designated as travellers' accommodation under the resource consent), are services of a kind ordinarily acquired for personal, domestic or household use or consumption, and VN is therefore a consumer for the purposes of that Act.

Issues

[9] The issues to determine are:

a. Did the two sets of building consent plans constitute one contract or two?

b. What was the nature of the contract/s?

c. Is DM entitled to payment by VN of the amount he claims?

d. Did DM provide his services with reasonable care and skill and were the resulting goods (the plans) fit for their particular purpose (as per the Consumer Guarantees Act 1993)?

e. Is VN entitled to a remedy under the CGA?

f. Does VN's counter-claim succeed?

Did the two sets of building consent plans constitute one contract or two?

[10] I find that there were two separate contracts. There is no dispute that the first job was completed and paid for before the second job was requested. Therefore the first contract was at an end and a new verbal contract was formed when DM was engaged to produce plans for travellers' accommodation.

[11] There was some suggestion in VN's written submissions that DM should have known from the outset and advised VN that a larger building in the form of travellers' accommodation would better suit VN's needs. However, the context of DM's initial engagement was through a firm VN had already engaged to construct a simple, fabricated off-site bach and I have seen no evidence that he was asked to do anything except produce plans for such a building at that stage.

[12] At no stage was there any evidence of communication from VN to the effect that the second job was, in effect, remedying aspects of the first job or of any complaint at all about the first job. VN's representative at the hearing, CC, accepted that they were two separate contracts. DM was told that the total budget for the first job was $250,000.00. He was not told a budget for the second job, which was for a much bigger building.

[13] For these reasons, the remaining issues will be addressed only in the context of the second contract as the first was fully performed.

What was the nature of the contract/s?

[14] I find that, although there was nothing recorded in writing for the second contract, it took much the same form as the first, being an engagement of DM to produce plans and documentation up to building consent stage. DM was not involved in the project after building consent was obtained and was not consulted or referred to during the construction phase.

[15] The total amount invoiced on the second contract of $6,182.40 is consistent with this level of involvement.

[16] As there was no fixed price agreement or estimate for the second contract, it was performed at an hourly rate (the same as the previous contract) of $48 per hour plus GST and disbursements.

Is DM entitled to payment by VN of the amount he claims?

[17] I find that DM performed the contract, producing plans and documentation to building consent stage, building consent was obtained and the amount charged is reasonable for the nature of the work undertaken. Any set-off will be considered below.

[18] VN queries the costs outlined on the invoices, also querying the fact they were produced some time after the building consent documentation was lodged. On this latter point, DM said that it is not unusual for issues to arise from the plans during the construction phase and for the designer to be consulted, so he was waiting to see if he was needed for further input before submitting final costs. The invoices clearly note the period for which work is being charged and it was all prior to building consent being obtained.

[19] Regarding the actual cost, the $6,182.40 invoiced compares favourably to the $4,968 allowed for the first job, which was for a smaller, simpler building. In my view the price is well within the normal range one could expect to pay for a service of this kind.

Did DM provide his services with reasonable care and skill and were the resulting goods (the plans) fit for their particular purpose (as per the Consumer Guarantees Act 1993)?

[20] I find that there has been no breach of guarantee on the part of DM. The main issues that VN links to costs in its counter-claim are a steel support beam that intrudes into the living area, the fact that the building was designed with wooden floors instead of concrete floors, the fact that the kitchen window was relocated during the construction phase, and associated additional building costs and time delays. These issues will be addressed individually below.

[21] With regards to the steel support beam, VN has produced a photograph showing that the beam is located in the living space in a way that I accept is physically inconvenient and visually intrusive. However, DM says the position of the beam was discussed with BB, VN's sole point of contact during the project, by Skype (BB resides in X) and says he explained to him that he could amend it later on, once VN provided him with details of the joinery to be used. He says BB was in a hurry to have the building consent application lodged and instructed DM to lodge the plans as they were, agreeing that amendments could be made

later. DM says he was never supplied with the joinery detail he would have needed to amend the beam position and was not asked to do so by VN. He further says that to do so would have necessitated a complete review of the engineering calculations by the consultant engineer. I note that the beam is also visible in the elevation drawings submitted for building consent. DM is not in breach of a guarantee over the beam given these circumstances.

[22] Regarding the floor type, VN contends that it raised the possibility of concrete floors and was told by DM that this was not possible or necessary. However, the evidence it has presented in the form of an email from DM does not support that contention. The email reads "I would use large tiles on compressed sheet on timber floor. This allows enough height from floor to the ground as a fencing for future swimming pool. Also excavations are kept to a minimum." This is advice that was apparently accepted by VN and there is no supporting evidence that concrete floors were discussed or requested. VN's builder has included in his written statement, simply the following sentence: "it would have made things much simpler by having a concrete floor (for tiles, etc)". I cannot conclude from the evidence available that DM's advice to use a wooden floor constitutes a failure of reasonable care and skill or a breach of any other CGA guarantee.

[23] With regard to the kitchen window location and other general issues raised in respect of the quality of the plans, there is insufficient detail of the alleged problems to allow a finding of a breach of guarantee. VN has provided an email from another designer who gives the view that "the drawings appear to be incomplete and with some fairly significant errors" – he notes several details relating to the drawings in his email. He is of the view that Council should not have approved them.

[24] However, I cannot accept this emailed opinion as expert evidence, as I have not been provided with details of the designer's qualifications and/or experience and he was not available to the Tribunal hearing in person as a witness. The fact that Council did approve the plans must outweigh this emailed opinion and be taken as evidence of compliance with the Building Code and relevant regulations.

[25] It is also problematic for VN that there is no evidence at all of any communication with DM about any of the alleged problems encountered during the construction phase (and DM says he heard nothing at all from VN until he asked for payment, some considerable time later), let alone any opportunity for DM to remedy or be involved in finding solutions.

[26] VN has also submitted a general line of argument to the effect that they do not believe that DM had the required expertise or experience to produce quality plans for a project of this nature. In response, DM outlined his qualifications and experience at the hearing. He presented a dossier of previous projects, of varying sizes and complexity (some much larger than the building in question here) as well as his current licensing certificate (as a licensed building practitioner). He clarified that he is qualified as an architectural designer and I accept that he has not held himself out to be an architect (although he noted that he is in the final stages of full registration with NZIA).

[27] In support of the above argument, VN has made references to emails from DM, in which he uses phrases such as "it is good practice to …" and "practice development", but reading these in context, I understand him to mean practice as in "exercise of his profession" not "rehearsal". I consider the meaning apparently taken by VN from these phrases rather obscure.

[28] In conclusion, a building consent was obtained using DM's plans. I agree with VN that the plans should also be fit for the purpose of constructing a quality dwelling. However, it is not unusual, especially when the designer is not engaged for the construction phase, for conflicts between the drawn plans and the needs/wishes/capabilities of the builders and other tradespeople to result in additional work and costs on-site during the construction phase, quite apart from any changes requested by the client as construction progresses.

[29] There is insufficient evidence produced by VN in this case for me to be satisfied that there were inherent deficiencies in the plans produced by DM and that where a built outcome was less than ideal (as in the case of the steel support beam), that this was not the result of discussion and agreement with the client.

Is VN entitled to a remedy under the CGA and does VN's counter-claim succeed?

[30] I find that, because there has been no breach of guarantee established, no remedy is available to VN and the counter-claim is dismissed.