



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 700

APPLICANT	H Ltd
RESPONDENT	T Ltd
SECOND RESPONDENT	NX
THIRD OR SUBSEQUENT RESPONDENT	B Ltd
RESPONDENT INSURER (for T Ltd)	XX

The Tribunal orders:

The claim is dismissed.

Reasons:

1. H Ltd were contracted by NX to build a house. NX contracted separately with B Ltd for the house plans. H Ltd contracted T Ltd for the site survey and layout.
2. When requested to start works, T Ltd requested plans from B Ltd to enable them to set out the site. H Ltd then started building set out work. However, as the project progressed, they realised there had been an error as the measurements on the plans did not match those on site.
3. TH, director of H Ltd, notified the architect and discussed the problem with NX and her daughter, NM. The architect put forward options for remedial work, however both TH and NX were concerned about the delays that would result from the options proposed. They therefore decided to proceed with an option proposed by TH. No costs were discussed. At the time, TH thought the additional cost would be absorbed by the PC sums in the contract for site work, foundation and pile digging. However the project went over budget and the PC sums were absorbed. H Ltd therefore claim in the Disputes Tribunal for compensation for the additional cost incurred providing a remedy.
4. The issues for the Tribunal to determine are as follows:
 - i. Is NX liable under the contract to compensate H Ltd for the cost of completing remedial works?

- ii. Did H Ltd breach their contractual obligations by failing to ensure the site had been set out properly?
- iii. Are B Ltd and/or T Ltd liable to compensate H Ltd for any breach of their obligations under their contracts by failing to ensure plans provided were accurate?

Is NX liable under the contract to compensate H Ltd for the cost of completing remedial works?

5. A person may be liable to another under the explicit or implied terms of a contract. They may also be liable for variations to the contract, with liability for any variations being explicit or implied, or under quasi contract, where they have taken advantage of a benefit provided by another.
6. It is agreed NX had a contract with H Ltd for the house build. The contract included provisions for variations. It is also agreed NX agreed to the variation proposed by H Ltd to remedy the plan defects. The difficulty is that no costs were discussed at the time. NX's daughter, NM, stated in evidence that they were not expecting to pay anything towards the remedial work as it was believed by them and H Ltd that any amount over and above the PC sum would be covered by the insurer for B Ltd. That however was an assumption made and was not confirmed by B Ltd or their insurer.
7. There is no doubt NX did receive a benefit from the services provided by H Ltd as remedial work was essential if the project was to be completed. As additional costs were inevitable, and as NX agreed to the works that were undertaken, I find, in the first instance, that NX could be liable for costs incurred to vary the contract, provided the builder complied with his obligations under the contract.

Did H Ltd breach their contractual obligations by failing to ensure the site had been set out properly?

8. H Ltd had an obligation to provide services with reasonable care and skill in a tradesman-like manner. TH claims the fault lies with B Ltd as the plan they provided to T Ltd for setting out the site was wrong. T Ltd asked B Ltd, in an email dated 2 September 2020, for the DWG file of architecture site plans as they needed it "*for the building and retaining wall set out*". B Ltd then sent T Ltd a plan numbered A0111. T Ltd used A0111 to set out the site.
9. B Ltd however state A0111 is a master site plan for resource consent purposes only and should not be used for site set out as the dimensions are not necessarily the set out points. T Ltd should have used A2111 instead. A0111 also contains a disclaimer not to rely on the measurements. B Ltd state ultimate responsibility lies with the builder to double check the site set up.
10. T Ltd was in possession of the set of plans. However NL, director of T Ltd, stated it was reasonable for him to use the master site plan as he requires all the dimensions of the site, boundaries and other buildings.
11. From the evidence provided, it is clear B Ltd had an obligation to provide clear unambiguous plans and set out instructions, particularly when NL stated in his email the purpose for which the DWG file was required. As the plan provided to NL contained measurements that were inconsistent with other plans, I find the plans were ambiguous.
12. [Building evaluator] information also indicates T Ltd had an obligation to accurately locate boundaries and obtain site levels. Whether it was reasonable for T Ltd to rely on the master site plan provided, or whether they should have compared all plans, was not specified.
13. Regardless of the above and the possibility of previous errors, [Building evaluator] evidence provided also indicates the builder has a responsibility to check that the site set out is to the correct dimensions. TH acknowledged this could have been done in hindsight however he considered it reasonable to rely of the work provided by B Ltd and T Ltd.

14. H Ltd had an obligation under their contract with NX to supervise the site. In view of their contractual obligations, and the [Building evaluator] guidelines, I find H Ltd breached their obligations as they failed to ensure the site had been accurately set out before commencing building. It is evident that had such checks been carried out, the need for remedial work would have been avoided.

15. In view of the breach of obligation by H Ltd, I find NX not liable to pay for remedial works.

Are B Ltd and/or T Ltd liable to compensate H Ltd for any breach of their obligations under their contracts by failing to ensure plans provided were accurate?

16. The jurisdiction of the Disputes Tribunal is in contract. As B Ltd did not have a contract with H Ltd, they are not liable to H Ltd for any losses incurred. The claim against B Ltd is therefore dismissed.

17. T Ltd did have a contract with H Ltd. T Ltd were not advised of the problem until after remedial works had been carried out. However, no evidence was presented to confirm it was unreasonable for NL to use and rely solely on the Master Site Plan. The claim against T Ltd is also therefore dismissed.

Referee: DTR Edwards
Date: 19 December 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>.