London Arbitration Centre Case No. ic001019

In the matter of an Arbitration

The seat of Arbitration is in England & Wales

Under the ADR Procedure for the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015

In accordance with the London Arbitration Centre Rules of Procedure

Date of Award; 17th June 2019

Between;

XXXXXX XXXXXX

(the consumer)

And

(1) XXXXXX
(2) XXXXXX

T/a Caister Construction (A firm)

(the trader)

ORDER

Introduction to case

The consumer brings a claim against the trader for damages arising from building works carried out by the trader at her home in Lowestoft, Suffolk. Briefly, the building works consisted of work to remove the existing conservatory and then to build a new kitchen extension. The consumer claims that the trader failed to use reasonable skill and care in the construction of the kitchen extension contrary to section 49 of the Consumer Rights Act 2015.

The referral to arbitration

The consumer has submitted the dispute to the London Arbitration Centre (LAC) for resolution by Alternative Dispute Resolution (ADR) and by written notice dated 4th April 2019, the trader consented to the resolution of the dispute by way of ADR by LAC.

Both parties have agreed that the decision of the LAC is binding upon each of them.

The procedural history

A certain amount of time in the procedural history has been taken up collating the various items of damage alleged by the consumer into a format which enables the trader to properly address the items of complaint and to enable proper adjudication in relation to the various elements of the claim.

Following a first review of the claim, on the 8th April 2019, the consumer was asked to clarify various aspects of the claim and the amount of damages claimed from the trader. By email dated 23rd April 2019, the consumer requested and was granted further time to provide the information. The consumer added a claim in relation to the fascia boards. Time was extended to 7th May 2019.

Thereafter the consumer submitted additional evidence in support of her claim including photographic evidence. By email dated 8th May 2019 to both the named individuals trading as Caister Construction, the information supplied by the consumer was submitted to them. The claim was submitted in the form of a '*Points of Claim'* – a document drafted by myself accompanied by the photographic evidence supplied by the consumer together with various estimates showing the cost of putting right the alleged defective work. I should point out that the consumer had sent to the trader a letter before action dated 18th September 2018 in which most of the allegations were already put to the trader. I have not seen a substantive reply to the letter although I have seen evidence that the parties continued to communicate with each other about the issues.

The trader was required to respond to the Points of Claim with a response in the form of a *Points of Defence* and provide information on the various alleged defects set out in the form of a '*Scot Schedule*.' This is a typically used in construction type disputes where there are multiple items of alleged defects which fall to be adjudicated upon on an individual basis. The time for responding was 5pm on 29th May 2019.

In the meantime, the consumer indicated by email dated 16th May 2019 that she now also sought permission to bring a claim for the cost of rendering external brickwork. This was refused for the reasons set out in the email to the consumer (copied to the trader) dated 16th May 2019 timed at 10.27.

The trader has responded to the claim by email dated 28th May 2019 but not in the form expected. I have set out the response below (copied from the email dated 28th May 2019);-

Please find below my response to the above claim.

Firstly regards to the roof XXXXXX Pearse accepted my offer of £2000 which was confirmed in email dated 19/12/18 , this offer was based on quotation l had from a roofing contractor, however she choose an inflated price. I am not prepared to offer any more as this was agreed I did not go back on my offer and would not expect ms Pearse to do either.

Regards to Windows and doors, firstly they where not off the shelf as claimed, the windows and doors where made to measure and manufactured by Polyframe using the Rehau system (this is the factory that makes First Home Improvments windows and doors) The windows and doors have at no stage been cut down as claimed as once the profile cut there would not be anyway to fix. The pictures shown do not reflect the finish I had seen when on completion myself Neil Shaun and ms Pearse walked round and agreed that she was happy both Neil Shaun and myself would swear on this in court of law.

I accept some of the scratches etc although not seen at time and would be prepared to rectify as I have already stated.

With regards to the use of battens and expanding form and add ons this is common practice within the industry and every fitting team in the UK would be using these methods.

I understand that building control passed the windows and doors to a minimum standard (email dated 06/02/19) to my knowledge building control do not have minimum of maximum standards the windows and doors and other works are either compliant of non compliant. The job is not signed off as electrics not complete as stated in email dated 26/12 /18.

Ms Pearse knew from day one that First Home Improvements where not going to supply and install as the price would have been£9875 without any building work. Regards to flooring it was never part of our remit all internal works by others. With regards to guarantee I purchased windows and doors through GAP who guarantee frames and glass for 10 years.

In conclusion as stated l would be prepared to offer remedial works as in my view this would rectify the issues.

XXXXXX

The decision

There are three multiple parts to the claim. I propose to deal with each separately under sub headings.

The roof

I understand the roof has already been replaced on the advice of the local authority building inspector following an inspection by him. I understand the work to replace the roof was carried out by Cross Roofing Limited at a cost to the consumer in the sum of £3856.00.I have been supplied with a copy of the 'guarantee' from Cross Roofing Limited showing the contract price and the date for the commencement of the guarantee being the 13th December 2018.

The Mr XXXXXX (on behalf of the trader) claims the consumer has already accepted his offer of £2000.00 in settlement of this aspect of the claim. He points to the email dated 19th December 2018. The consumer accepts that a payment has been received by her, however, she claims this a payment *towards* the cost of the £3856.00.

I have reviewed all the relevant emails between the parties and by way of summary these are as follows;-

Email dated 28th November 2018 timed at 17.34

Mr XXXXXX states " ..*I will get a reputable roofing contractor to come and put right at my own expense not Caister Construction Company the contractor will be T Day Roofing Contractor….I cannot make excuses the work on roof is not to standard…"*

Email dated 29th November 2018 timed at 18.29

Ms XXXXXX states "*I am unable to find T Day Roofing Contractor online or on Companies House, so I have no proof of this companies reputation….i will be remaining with my original choice of company…"*

Email dated 29th November 2018 timed at 19.04

Mr XXXXXX states " …….*I do not now work with Jonny and Caister Construction Company is now not trading……..I would be prepared to offer £2,000 as this is how much I would be paying T Day roofing you would not be able to get any money from Jonny.*"

Email dated 30th November 2018 timed at 17.55

Ms XXXXXX states "…*I am no longer prepared to have any work carried out by a company that I have no knowledge of…..Although you have made an offer of £2000 I am not sure I am willing to take such a financial loss…."*

Email dated 1st December 2018 timed at 14.43

Ms XXXXXX states "*Johnny……Kevin has admitted liability for the very poor workmanship/installation and has offered to pay £2000 towards the cost of replacement. He has suggested that I contact you to request the balance of £1,800 as you are liable in this matter.."*

Email dated 11th December 2018 timed at 18.24

Mr XXXXXX states "*Sorry have just got back from Bedford and I have read your letter I am not in a position to pay that amount as I'm not working I have been left with bills after splitting with Kevin all I can say is I'm sorry the way things turned out and suggest you have*

a word with Kevin I have no money to give you or a small claims court but if you give me some time I'll try to resolve this issue Johnny"

Email dated 16th December 2018 timed at 19.00

Ms XXXXXX states *"Kevin I have contacted Johnny as you advised, he pleaded poverty as you predicted when he finally replied ! will forward his email….I am still not sure I am able to accept your offer of £2,000, or whether I should pursue the matter in the small claims court*"

Email dated 19th December 2018 timed at 19.09

Ms XXXXXX states "*Kevin After giving this matter much consideration I have decided to accept the offer of £2,000 from yourself as a payment towards the cost of reinstalling the roof"*

Email dated 3rd January 2019 timed at 16.13

Mr XXXXXX states " *XXXXXX Sorry not to have come back to you been away (no phone or wi fi heaven) it is my solicitor who wants copy warranty and building control sign off it is to cover me from any future claim and distance my self from Johnny, my address is…once I have details will pay you £2000 straight away as promised*."

When I consider the email communications between the parties I can see that Mr XXXXXX has made an offer of £2,000. I can also see that the consumer as also "*decided to accept the offer of £2,000 from (him) as a payment towards the cost of reinstalling the roof".*

At first glance, it would appear that the issue I have to decide is whether the acceptance of the offer by the consumer is an acceptance of an offer or a qualified acceptance in that this is the consumer simply acknowledging that the payment will go only some way towards the cost of reinstatement of the roof. If this was the question, I would find in favour of the trader on the basis that the consumer indicated that she *accept(ed) the offer* and '*the offer'* can only mean the offer that had been proposed by Mr XXXXXX. This may not have been the intention of the consumer when using the words she does.

When I look at the offer and acceptance as part of the overall relationship between the parties, however, I find that Mr XXXXXX is a partner in the firm of Caister Construction together with Mr XXXXXX. *The offer* by Mr XXXXXX is therefore to be considered against the liability of the firm. I find that the offer made by Mr XXXXXX still leaves open the liability of the firm to the consumer. I accept as correct what the consumer tells Mr XXXXXX in her email to him dated 1st December 2018 timed at 14.43

…Kevin has admitted liability for the very poor workmanship/installation and has offered to pay £2000 towards the cost of replacement. He has suggested that I contact you to request the balance of £1,800 as you are liable in this matter.."

I accept this as correct because the consumer even says so much when she tells Mr XXXXXX by email dated 16th December 2018 that she contacted Mr XXXXXX as (*he) advised* her to do. Mr XXXXXX does not challenge this account. In legal terms, each partner is liable for the other's partnership debt. Section 12 of the Partnership Act 1890 states as follows;

Liability for wrongs joint and several.

Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

The real difficulty finding in favour of the trader is the email dated 3rd January 2019 from Mr XXXXXX to the consumer which tells me that Mr XXXXXX is aware of the legal implications arising under the law (or that his solicitor is aware). Mr XXXXXX does not do enough to shield himself or the firm from the liability that arises by virtue of the Partnership Act 1890.

I have to decide whether Mr XXXXXX can show that the consumer has discharged the firm or him personally from the debt which he is otherwise jointly and severally liable to pay with Mr XXXXXX. I do not consider that a *copy of the warranty* and *building control sign off* is enough to *'cover (him) from any future claim and distance (him) self from Jonny*' (see email dated 3rd January 2019 from Mr XXXXXX). In my view, the firm has not been 'released' from the liability to the consumer. The offer made by Mr XXXXXX to the consumer (and accepted by the consumer) does not release him from the liability or discharge the liability of the firm but specifically leaves open the prospect of a claim against Mr XXXXXX.

For want of a better description, I find the offer by Mr XXXXXX to be 'defective' in that both Mr XXXXXX and Mr XXXXXX are partners in the firm and therefore each is liable to pay the others debts. In this case, Mr XXXXXX is liable to pay what he believes to be Mr XXXXXX liability. I find Mr XXXXXX to be joint and severally liable with Mr XXXXXX for the balance outstanding in the sum of £1856.00 even though the offer to pay £2,000 came from Mr XXXXXX. As between Mr XXXXXX and Mr XXXXXX the liability may have been split £2,000 and £1856.00 respectively but as between the firm and the consumer the liability is still £3856.00 (less £2000 paid) and it does not matter in law against which of the partners the consumer decides to enforce payment of (or balance of) the order.

What should have happened is that Mr XXXXXX should have informed the consumer that the offer made by Mr XXXXXX was in satisfaction of the firm's debt when he replied to the consumer when he did by email dated 11th December 2018. Instead, he says *if you give me some time I'll try to resolve this issue.* This tells me that the liability of the partnership is a continuing liability regardless of the offer made by Mr XXXXXX.

In summary, Mr XXXXXX's offer did not have the effect of discharging the firm's debt and therefore as partners in the firm, both Mr XXXXXX and Mr XXXXXX remain jointly and severally liable for the balance of £1856.00.

<u>The doors and windows</u>

The consumer claims have been set out in the Points of Claim as follows;

1. Doors & window don't match existing.

2. Patio doors 30mm short in width (filled with roof baton and expanding form) 45mm add on piece. Draughts all around.

3. French doors cut down no longer correct width. 45mm add on at top plus 15mm expanding foam. 25mm cement fillet under sill. Let in draughts and water.

4. Window cut down.15mm expanding foam to one side. 10mm to the top and 20mm cement fillet under the sill. Draughts from outside.

5. None of all open, close or lock correctly.

6. Damage to all.

The latter being scratches and marks rather than a catch all category of damage. I should say that the consumer has supplied photographs of the damage (in excess of 40) in support of her claim. These have been copied to the trader.

As I say above, the trader did not respond in the way expected by way of annotated comments in the Scott Schedule. The response in relation to this I have set out above and repeated below;-

Regards to Windows and doors, firstly they where not off the shelf as claimed, the windows and doors where made to measure and manufactured by Polyframe using the Rehau system (this is the factory that makes First Home Improvments windows and doors) The windows and doors have at no stage been cut down as claimed as once the profile cut there would not be anyway to fix. The pictures shown do not reflect the finish I had seen when on completion myself Neil Shaxx and ms Pearse walked round and agreed that she was happy both Neil Shaxx and myself would swear on this in court of law.

I accept some of the scratches etc although not seen at time and would be prepared to rectify as I have already stated.

With regards to the use of battens and expanding form and add on's this is common practice within the industry and every fitting team in the UK would be using these methods.

I understand that building control passed the windows and doors to a minimum standard (email dated 06/02/19) to my knowledge building control do not have minimum of

maximum standards the windows and doors and other works are either compliant of non compliant.

I can see that there are items of alleged damage that can only be judged on a physical inspection such as whether or not the doors and window open properly or whether there are draughts emanating all around. I can also see that the latter might also depend on the finish. I note the trader has not responded to these, in my opinion, key allegations of damage. I have, however, taken into account what the trader has stated in relation to these items of complaint in various email communications between the parties. The trader states the use of baton and expanding form in the response as common practice. He does concede that are *'some of the scratches etc'* which he states he is able to rectify.

I have considered whether to ask the parties to obtain the opinion of an expert in the field of UPVC windows and doors in order to resolve this dispute. In deciding whether to ask the parties to obtain an expert report, I have taken into account the cost of obtaining an expert report. Clearly, one or both parties would ultimately have to burden the cost of such a report. I am, instead assisted by Mr XXXXXX who is an expert in UPVC windows and doors. MrXXXXXX is appointed by LAC independent of the parties. His report was served on the parties by email dated 29th May 2019. The parties were requested to provide comments on the report and a reasonable period of 7 days was allowed for them to do so. I confirm no comments have been made in relation to that report by either party nor has there been any request for an extension of time or any request to supply a second expert report in reply.

On this basis I have decided that it is not necessary to order a physical inspection by an expert who can report on the matters not apparent without a physical inspection.

The salient points of MrXXXXXX's report is as follows;-

"…

5. In my opinion the photographs show poor workmanship and an inability to finish the work to a reasonable standard.

<u>Foam on surfaces</u>

When foam is applied to white PVC windows, it will generally once set, be easily removed. This is because the surface is smooth. In this case, the PVC windows are veneered. Foam has been applied without masking tape and as a consequence the veneer has been permanently damaged. There is numerous instances where this has occurred.

<u>Marks & scratches</u>

It appears that the frames were damaged when they have been fitted. There are marks and scratches which cannot be attributed to workmanship in this case but some of the photographs show marks on the frames which look as though they have been levered into position. The damage has been left. Holes have been drilled and not used or even covered up afterwards with screw covers.

<u>End caps</u>

Some of the end caps appeared not to have been correctly fixed into the sills. This might have been a minor issue however this does give an overall poor impression of the standard of the workmanship.

6. The only qualification I make to this report is that I have not carried out a physical inspection of the works. In view of the findings above this is not likely to alter my opinion as the frames would still be badly damaged. I cannot comment on draughts but one photograph does show water ingress.

7. I have also seen an estimate supplied by Sunrise Installations in the sum of £3495.00. My opinion is that the charges are reasonable and represent the loss suffered by the consumer…."

Whilst I must consider the expert report of MrXXXXXX as just one aspect of the overall evidence in relation to the claim, I am persuaded that the window and doors have been damaged during the installation process and that these are beyond rectification by reason of the presence of foam on the frames.

I do not believe that a '*walk around'* by the consumer can be interpreted as anything other than a work around. The trader states;

The pictures shown do not reflect the finish I had seen when on completion myself Neil Shaun and ms Pearse walked round and agreed that she was happy both Neil Shaun and myself would swear on this in court of law.

Before the consumer can be considered to have accepted the defects, the defects should be specifically drawn to her attention and she must have specifically agreed to waive her rights in relation to the same. There is no allegation that any defects were drawn to the attention of the consumer during the walk around or that she has waived her legal rights in relation to such defects.

The consumer states in relation to the walk round (see her email dated 19th February 2019 timed at 19.53) "..*you left when the French doors were only half fitted……patio doors still not touched. Shaun hurriedly refitted patio doors, with a crow bar to the bottom,….Neil returned at a later date to finish the door fitting and finishing…The faults in the glass can clearly be seen from 5 metres away*". I am inclined to accept what the consumer states in view of the evidence of MrXXXXXX who has seen the photographic evidence in this case.

I also do not accept that the damage to the frames can be repaired and I specifically do not accept what the trader states in his email dated 17th February 2019 timed at 14.59 that "*The marks on the frames can be repaired using a light oak touch up pen which is again standard procedure as movement in transition is unavoidable*". Again, I rely on the evidence of MrXXXXXX who states in his opinion marks left by expanding foam cannot be removed.

On the basis of my findings on the evidence of MrXXXXXX, I do not need to go further and make any determination about the other matters subject of complaint. I do not need to make any determination as to whether the window and doors are the right size, or whether

the use of batons is acceptable or not or any other matter subject to complaint set out by the consumer listed in the Points of Claim in relation to the window and doors.

I find that the trader failed to use reasonable skill and care fitting the window and doors and the window and doors need to be replaced. Superficial marks and scratches could have been dealt with by rectification or by way of a price reduction (at the election of the consumer-see below). I do not consider these remedies suitable here because the damage is beyond repair according to the evidence of MrXXXXXX. I find that the cost claimed by the consumer for replacing the window and doors to be reasonable. The cost of replacing the window and doors is supported by a quotation supplied by Mark Wilson on behalf of Sunrise Installations Limited dated 4th February 2019. I accept the claim by the consumer for the replacement of doors and window in the sum of £3,495.00.

I have disregarded any consideration as to what building control may or may not have said. I have seen no evidence from 'building control' either. The issue of the guarantee, as by reason of my findings above, been rendered irrelevant. If I did have to decide this issue, I would find that there is no trader's liability under an alleged guarantee. The consumer states the guarantee was communicated to her verbally during the process of installation. She states in the Points of Claim that;-

The guarantee from Kevin was not taken into account as I assumed that the products were being supplied and fitted by First Home Improvements so I would get the guarantee and Fensa certificate from them.

I find there was no guarantee in the contract made between the parties. As I say, this is now only an incidental issue.

<u>The trader's offer to carry out remedial works</u>

The trader states in his response;-

In conclusion as stated l would be prepared to offer remedial works as in my view this would rectify the issues.

The Consumer Rights Act 2015 provides for new remedies of price reduction and repeat performance to enforce the terms of a service contract. These remedies are, however, at the election of the consumer and not the trader.

In this case, the consumer has positively decided no longer to use the services of the trader (see her emails to the trader dated 28th November 2018 timed at 11.45.

The consumers states;-

" I feel so let down and disappointed by you and your company. I have used ten days of my annual leave from work to accommodate your employees allowing them ample time to remedy their poor workmanship. Three attempts at the roof….being very generous on my part.."

It is clear that the consumer has lost confidence in the ability of the trader to carry out any further work. The consumer having lost confidence in the trader, I find that the consumer is

under no legal obligation to accept the offer made by the trader to allow the trader to carry out any remedial works. In any event, I find remedial works would not change the damage caused by the foam.

Fascia Boards

The consumer claims damage to the fascia boards. She has supplied evidence in the form of photographs. I also have a quotation supplied by Mark Wilson on behalf of Sunrise Installations Limited dated 2nd May 2019 in the sum of £650.

The quotation is for the following work;

To carefully remove and dispose of existing timber roofline material.

To survey, supply and install Golden Oak colourfast UPVC Fascia and Soffits, to include Black Guttering.

To check and remedy any decay found in rafter ends.

I have no response from the trader to this item of claim. I therefore must decide this aspect of the claim based on the evidence supplied by the consumer. I accept the claim by the consumer for the repair to the damage in the sum of £650.00.

Other items of damage

The consumer sets out various other items of claim. I can summarize these as follows;-

1. Floor is not correctly laid;
2. plastering work needed;
3. Cement stains on brickwork;
4. There was extra cost for materials and work, incurred insulating and plaster boarding the vaulted ceiling due to the roof timbers running out up to 50mm in a 1m length.

Significantly, there is no sum claimed for these items of loss. I do not find that the claim has been proved in relation to these items of the damage.

Mental distress

The consumer states she has experienced has anxiety, stress and inconvenience dealing with the problems arising from the defective works carried out by the trader as well as incurring extra heating costs. She also tells me that she has had to take time off from work. I have already advised the parties that this is a proper head of claim (see Batty - v- Metropolitan reaXXXXXXtions 1978 QB 554).

It seems to me that projects of this nature do come with what might be called 'headaches' even with the best executed jobs but having to take time off from work to allow the trader to deal with rectification works is beyond what might be considered acceptable. I find the consumer has suffered anxiety, stress and inconvenience because of this and in all the circumstances, I am going to order the trader to pay £100.00 to the consumer for this head of the damage.

ORDER

IT IS HEREBY ORDERED that the trader pay the consumer the sum of £6101.00 within 14 days of the date hereof.

Date 17th June 2019

Signed 

Mr Ayub Sadiq

ADR Official appointed by the London Arbitration Centre Limited

LONDON ARBITRATION CENTRE

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