(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2023] NZDT 190**

APPLICANT **D Ltd**

RESPONDENT **L Ltd**

The Tribunal orders, on the claim and counter-claim:

L Ltd is to pay $13,479.63 to D Ltd on or before 30 May 2023.

Reasons

1. L Ltd, as head contractor on a large construction job, contracted D Ltd to provide foundation works (materials and labour) to the [Address] site.

2. There was an agreed contract price for the foundation works of $153,308.80 incl GST. In addition, there was a variation for additional work requested by L Ltd that D Ltd invoiced at $2051.86, of which L Ltd certified $650.00.

3. Another variation was communicated to D Ltd by email from L Ltd on 5 October 2021 and the dispute largely centres around what this variation entailed, and what reduction, if any, in the contract price should have resulted.

4. To date, L Ltd has paid $137,010.54 incl GST. D Ltd claims the difference between the original contract price and the amount paid, being $16,298.26, plus the variation invoiced at $2051.86, plus undisputed unpaid invoices from another site of $1518.00 and $3162.50, for a total claim of $23,030.62.

5. L Ltd counter-claims that they have over-paid, and seek a refund of $6951.98 based on their assessment of the revised contract price following the variation communicated on 5 October 2021.

6. The issues to be determined are:

    - Had the steel for the footings already been delivered to site before 5 October 2021 (when the footings variation was communicated)?
    - Is L Ltd liable to pay for all the steel already delivered to site as per the original contract?
    - What adjustment, if any, should there be to the contract price for placing the footings?
    - Is L Ltd liable to pay the claimed variation of $2051.86?
    - Did D Ltd provide the labour in January 2022 for the mesh/completion work?
    - What is payable on the claim and counter-claim?

Had the steel for the footings already been delivered to site before 5 October 2021 (when the footings variation was communicated)?

7. I find that D Ltd has proven on the balance of probabilities that steel for the footings as per the original contract specifications was delivered to site in August and Sept 2021, before a variation for footings came through on 5 Oct 2021. This finding is based on evidence provided at the last hearing by D Ltd in the form of their steel supplier's dispatch dockets matched to their truck GPS data which shows delivery of the starters and other relevant steel was made in August and September 2021.

Is L Ltd liable to pay for all the steel already delivered to site as per the original contract?

8. D Ltd contends that all the infill steel that was no longer required after the design change was made, had already been concreted in place when the foundation work was done (and before the design change) because it is necessary to do it at that stage. L Ltd disputes this and refers to photographs of steel rods sticking up from the foundations which they say show the additional steel had not already been fixed in place. Both parties agree that some steel for the footings had already been placed when the variation was made, and I cannot determine from the evidence available whether all of it had been placed.

9. The variation communication by L Ltd, contained in the email sent by L Ltd's engineer on 5 October 2021, was ambiguous, stating:

> *"Please find the attachment of revised structural drawings for [Address].*
>
> *Please don't bother with change from double starters to single starters.*
>
> *Please get [Steel Supplier] for quick pricing for change in new details for footings and could you please [wording missing from evidence] … availability getting the new steel details to site."*

10. The revised structural drawings include a change to the footings whereby double starters were to become single starters (using less steel), but the email immediately contradicts the effect of the new drawings by stating "please don't both with the change from double starters to single starters". Since, apparently, some of the starters had already been placed on site, the email could mean 'don't bother changing those that are already done" or, given that new pricing is requested, could mean 'don't bother making the change until the new pricing is available', but it is quite unclear, although the request for new pricing does not entirely make sense if there was to be no change to the amount of steel required.

11. The parties all agree that, some time later, a clear instruction was given verbally on-site to D Ltd's sub-contracted placers (the same company, [Steel Supplier], that supplied the steel) to change from double to single starters. Unfortunately the person from [Steel Supplier] who was managing D Ltd's sub-contracted work on-site is no longer with the company and was not available to provide evidence on these matters.

12. L Ltd provided evidence to show that, because variations are expected within the construction industry, processes for variations are incorporated into the relevant New Zealand Standards. The Standards provide timeframes and processes for agreeing or determining the value of a variation, but in this case, neither party followed up to clarify either the instruction (which D Ltd should have clarified) or the pricing change request (which L Ltd should have followed up).

13. If the process had gone smoothly at the time, D Ltd would have obtained a new price and it could have been determined what amount of now-surplus steel was non-returnable to the supplier (because, for example, it had already been bent into the shape required for placing) – that cost could then have been recovered by L Ltd from its client, they say. I accept that D Ltd should have

clarified the instruction from L Ltd's engineer but L Ltd's ambiguous communication on 5 Oct has muddied the waters considerably and L Ltd also failed to follow up the price change requested.

14. Based on the above, I find that both parties have contributed equally to the loss of any ability to charge the client for the additional, supplied but unused/unusable and non-returnable steel - the actual costs will be addressed below. I am unable to resolve the questions raised about what happened to that steel - L Ltd says it was not on site but there is evidence that it was delivered and there is no evidence of any return for credit at any stage.

What adjustment, if any, should there be to the contract price for placing the footings?

15. As per the discussion above, both parties' actions/inaction led to the situation where there is insufficient information to determine what the resulting adjustment should be to the contract price. L Ltd has made an assessment, based on QS evidence, that 85% of the original steel supply price is payable (and 75% of the steel placing price) but I am not persuaded of the basis for that on the evidence available (the QS was not brought as a witness nor other QS evidence obtained), nor do I understand the basis for the figures used in L Ltd's own calculation of steel value based on weight (and D Ltd disputes the calculations and challenges the credibility of the QS that L Ltd used, based on other dealings).

16. D Ltd obtained, from its sub-contractor, a price for the labour reductions obtained as a result of the footings variation, as $2040.45 (when D Ltd's margin is added). This is as unsubstantiated as L Ltd's figures, and while the sub-contractor [Steel Supplier] was directly involved, they are also therefore not independent and the figure given now does not seem to have been based on charges made at the time the work was done.

17. In the absence of tangible cost evidence, I will work backwards from D Ltd's total claim, addressing the more quantified amounts below, and as per my finding that the parties are equally responsible for losses arising from the October variation, divide the remaining balance 50-50.

Is L Ltd liable to pay the claimed variation of $2051.86?

18. Both parties agree that L Ltd issued another (more minor) work variation that L Ltd later certified the value for at $650.00, whereas D Ltd had invoiced $2051.86. As per the information L Ltd provided on the variation process under the NZ Standards, their engineer was to certify the value of the variation and in the absence of tangible evidence from D Ltd as to what was involved in the additional work requested, I allow the additional cost only to the extent that L Ltd accepts it, and $650.00 is awarded.

Did D Ltd provide the labour in January 2022 for the mesh/completion work?

19. D Ltd says it made workers available to L Ltd in January to complete a minor mesh task but that they turned up several times and the site was not ready for them. L Ltd disputes that, saying they did not turn up, and that they were 'chaotic', causing delays throughout the project.

20. In the absence of firm evidence justifying deduction from D Ltd's contract price for this part of the job (even if its sub-contracted workers did not actually do the mesh, there is insufficient evidence that they were unavailable to do it), no deduction is made from D Ltd's claim for this matter.

What is payable on the claim and counter-claim?

21. In applying 'equal responsibility' for losses arising out of the footings variation, I regard the starting point as D Ltd's claim for the balance of the original contract price, because L Ltd have not established their QS figures and have therefore not proven that they have overpaid. Anything

already paid is therefore deemed to have been accepted by L Ltd as for work done and materials provided, and the losses to be divided are only from the remaining balance.

22. That remaining balance is $16,298.26 once the undisputed invoices are removed from the total claim amount, and once the $2051.80 invoiced for the minor variation is also removed.

23. For all the reasons already given, L Ltd is liable to pay 50% of $16,298.26, being $8149.13, the undisputed amounts of $4680.50, and $650.00 for the minor variation, a total payable of $13,479.63.

Referee Perfect
Date: 2 May 2022

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.