(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2021] NZDT 1315**

APPLICANT **DF Ltd**

RESPONDENT **TS Ltd**

The Tribunal orders:

TS Limited is to pay DF Limited $6,187.15 on or before Thursday 6 May 2021.

Reasons:

1. TS Limited (**TS**) hired DF Limited (**DF**) to convert an 8-wheeler truck to a 6-wheeler truck and attach a water tank to the truck. DF says its invoice for services rendered has not been paid. TS says that the work was not carried out in accordance with the engineer's instructions and that it has incurred significant cost to rectify and complete the work.

2. DF claims $13,827.15 from TS in relation to its unpaid invoice.

3. The issues to be determined are:

    a) Did DF breach the contract in failing to carry out the service in accordance with the engineer's instructions?

    b) If so, did the breach entitle TS to cancel the contract?

    c) Is DF entitled to the sum claimed?

Did DF breach the contract in failing to carry out the service in accordance with the engineer's instructions?

4. 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.

5. The contract is also governed by the Contract and Commercial Law Act 2017 (**CCLA**). Under section 37(2) of that Act, a breach of an essential term by one party, or a breach of a non-essential term that substantially reduces the benefit of the contract to the other party, entitles the other party to cancel the contract and rely on the remedies contained in the Act.

6. The parties agree that the contract contained the following scope of works: 1) shorten the chassis; 2) shorten the ring feeder unit overhang; and 3) fit an 'as supplied' water cart.

7. The parties also agree that it was necessary to have engineer's instructions as to the measurements to carry out the job. That is so fundamental to a job of this nature that it may be viewed as a term of the contract.

8. The project engineer sent an email to DF on 20 October 2020. In the body of the email the engineer wrote:

> *"Some information to get you started. Attached is a sketch on how and where I think the chassis joint should be made. This is effectively turning a standard 8x4 into a standard 6x4. Also attached are the spec sheets for both models, and CAD drawings for your reference. Possibly handy for crossmember location. Note that the 8x4 wheelbase is currently different from when it was new. It was shortened in 2008. Any questions, please call."*

9. Relevantly, on the attached sketch were the words, "Drawbeam to be relocated. Position to be advised", with an arrow pointing where the ringfeeder mount was to be located. Also attached, as referred to in the email, were the manufacturer's CAD drawings for its 6x4 wheel truck.

10. DF says the instructions given were vague on details. It also says that it understood that the CAD drawings of the standard 6x4 had been supplied by the engineer in order to fulfil the requirement of instructing where to place the ringfeeder unit.

11. There are other areas of dispute between the parties, but this decision is primarily focussed on the issue of the ringfeeder placement. For completeness, it is also noted that TS disputes the number of hours invoiced and says the entire job should have taken no more than 80 – 85 hours (that is supported by a witness for Mr S) and that it was invoiced for 232 hours. DF says this reflects the lack of drawings for reinstatement of the componentry in the shortening of the chassis and for the project overall. TS also says it expected the job to be complete by the end of November and it missed summer water deliveries at significant opportunity cost. TS also says DF made holes in the frame for the tank, which came with pre-determined fixing points and those holes have had to be rectified so they are to the specification of the tank build. TS says it also had to rebuild the mounts as the chassis had been cut.

12. TS says that once the chassis was shortened (stage 1) it was necessary to ascertain the new combined weight of the rear and front axles in order to determine the placement and fitting of the mounting brackets for the ringfeeder unit to ensure that the water cart could hold the maximum volume while still being compliant.

13. TS emphasises that accuracy in placement of the ringfeeder was critical to this job. It says the CAD drawings show standard lengths, not instructions on where to place the ringfeeder. The position in the manual was an overhang of 1800mm, the maximum position (optimal volume and compliance) turned out to be 1900mm. The difference in the 100mm positioning resulted in a drop of 2000 litres of water per trip.

14. TS says it conveyed to DF that once the chassis had been shortened the truck would need to be taken away to determine the combined weight of the axles (to then determine the 1900mm measurement). TS's director says he said this to DF's director or to the DF engineer working on the job. He says he told them not to make permanent fittings until the truck had been weighed. He says that is why the position was "to be advised" in the engineer's plan.

15. DF denies that there was any discussion about needing to obtain the weight before sitting the tank in place and says that TS's director assisted in placing the tank in position. TS says such assistance was to see the tank in place, not to permanently fix the tank. DF says that TS's director visited 4 to 5 times in the first month, worked alongside the DF team and did not express any concerns. DF says its placement of the tank was to industry standard and compliant – it was placed to suit clearance for the pump and so the tank would sit as far forward as possible.

16. TS says it expressed concerns that the tank should not be fitted and said it would probably create more work (because the position would likely be incorrect). DF says this was not said, and certainly that there was no clear instruction to 'stop work'.

17. DF says it understood that the instructions necessary to complete the job were contained in the engineer's email set out above. It believed the engineer's instructions were to use the measurements supplied in the CAD drawings. In addition, it says TS as its client had specifically placed the tank in position seemingly indicating where it should go (and that TS also has expertise in this field).

18. TS says the manufacturer's drawings show standard placement not a bespoke placement to reach maximum volume and that DF should have known it only showed the standard chassis placement. TS says a lot of mechanical engineering jobs are bespoke and DF is expected to know that with a chassis rearrangement you need to take the axle weights and then get the engineer's recommendations.

19. A witness for Mr S also presented evidence at the hearing. Mr CN is experienced in this field and it is understood assisted with the later completion of the job. He confirmed that in a job of this nature you would need the combined weight of the axles before proceeding to the next stage after shortening the chassis. He said the CAD drawings were just what was standard off-the-shelf, not to show you how to make something bespoke. He says the key is to do what the engineer says and to follow the engineer's methodology.

20. DF questioned Mr N as to whether if the CAD drawings were supplied by the engineer it was then acceptable to follow those instructions. Mr N agreed that if those were the instructions, they must be followed. But he also suggested that if there was a problem, it should be identified and communicated to the engineer.

21. After DF had proceeded to make permanent fixings, TS had the axles weighed and obtained the correct measurements (for the 1900mm placement). When TS identified that the placement was incorrect, it took the vehicle from the DF workshop. TS says it has since incurred substantial cost to replace the position of the ringfeeder and rectify other work.

22. Whilst I accept that DF proceeded on the basis that it had received instructions from the engineer, I do not think that was reasonable in the circumstances for the following reasons:

    a) The body of the email specifically says that the drawing is to "get you started"; and that the CAD drawings are "for your reference" and "possibly handy". The language does not suggest that these are final drawings or that the CAD drawings are attached to show the location of the ringfeeder unit.

    b) On the sketch attached to the email it is noted that the position of the where the ringfeeder mount is to be located is "to be advised".

    c) Given the CAD drawings were attached to the same email as the sketch, it does not appear that it was intended that the CAD drawings were to be the basis of the positioning – this was still to come.

    d) DF says the details were vague, and the engineer's email invites DF to contact him if there are any questions. If there was uncertainty, it was available to DF to ensure that its interpretation of the use of the CAD drawings was correct.

23. For the reasons, I do not interpret the engineer's email as giving instructions to use the CAD drawings as the basis for the placement of the ringfeeder. That measurement was to be advised.

24. It was a term of the contract that it was necessary to follow the engineer's instructions and measurements to carry out the job. Therefore, in proceeding to complete the work without waiting for the measurements after the chassis had been shortened, I am satisfied that DF breached the contract.

Did the breach entitle TS to cancel the contract?

25. To be entitled to cancel the contract, it is not enough to show a breach of the contract, it must be a breach of an essential term, or a breach of a non-essential term that substantially reduced the benefit of the contract for the other party.

26. To be a breach of an essential term, the parties must have expressly or impliedly agreed that the performance of the term was essential to the cancelling party (s 37(2)(a), CCLA). It must be shown that DF and TS expressly or impliedly agreed that carrying out the project in accordance with the engineer's specifications was an essential term.

27. The issue is whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That requires an objective contextual appraisal, which is not based on what a party may have said about its intention (*Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90 at 25.)

28. Therefore, the relevant timeframe is when the parties entered the agreement and conduct of the parties after entry into the contract does not go towards a determination of whether the performance of the term was essential.

29. The question then is whether TS would have entered the contract had it known that DF would rely on the CAD drawings and not wait until the measurements had been obtained from the engineer for the placement of the ring feeder.

30. TS gave evidence that the accuracy in placement of the ringfeeder was critical to this job and that obtaining engineer's measurements was necessary to achieve such accuracy.

31. I am satisfied that TS would not have entered the contract had it known that the contract would not be carried out in accordance with the engineer's instructions and measurements, and so it was an essential term. I therefore find that because there was a breach of an essential term of the contract, TS was entitled to cancel the contract.

32. Cancellation takes effect after the fact is made known to the other party, which may be by words and/or conduct showing an intention to cancel. It is not necessary to use any particular form of words (s 41, CCLA). I am satisfied that when TS removed the truck from the DF workshop this was conduct showing its intention to cancel and that cancellation then took effect.

Is DF entitled to the sum claimed?

33. Section 42(1)(a) of the CCLA states that "to the extent that the contract remains unperformed at the time of the cancellation, no party is obliged or entitled to perform it further". However, a party remains liable to pay any obligation that was enforceable prior to cancellation, because the time for performance has already arrived (*Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173 (CA); *Garratt v Ikeda* [2002] 1 NZLR 577 (CA)).

34. DF issued two invoices for the job, one for $13,785.05 that was due 20 December 2020 and the second and final invoice for $6,042.10 that was due on 20 January 2021. (TS paid $6000 towards the first invoice.) DF says it is owed $13,827.15 for its unpaid invoices.

35. DF says that TS collected its truck from the DF workshop the day after the second invoice was due, so on 21 January 2021. As both invoices were enforceable prior to cancellation taking effect, the time for performance had already arrived and they remain due and owing under the contract.

36. Section 43 of the CCLA gives the Disputes Tribunal a wide discretion to grant relief following a valid cancellation. In applying section 43, the Tribunal must have regard to: the terms of the contract; the extent to which any party was or would have been able to perform it in whole or in part; expenditure incurred in pursuit of the contract; the value of work performed under the

contract; any benefit or advantage obtained by either party; and such other matters as it thinks fit (s 45, CCLA).

37. TS gave evidence that its staff had to rebuild the ringfeeder mount and repair the chassis damage from the prior mounting position and put the tank and its mounts in the correct position (with the measurements obtained after weighing the axles). The engineer also had to produce a new drawing for the rectification work at a cost to TS of $1000 (the drawing was produced at the hearing).

38. TS says its staff worked 52 hours on the project. TS accepted the hourly rate charged by DF of $70/hour and applying that to its own staff came up with a total of 52hrs x $70/hr = $3,640 (plus GST of $546 = $4,186).

39. TS also says it lost the opportunity to make water deliveries during summer and estimated the cost for December 2020 missed water deliveries at $6,500 profit.

40. I accept that the failure to wait for the final measurements, and other issues related to the correct positioning, created additional expense for TS and that the value of the work provided by DF is diminished for TS.

41. It is difficult to determine the value of the work performed by DF under the contract. TS says that the total job (when correctly completed) should have cost no more than $10,000 (and that appears to be supported by the time estimate for the job given by its witness). The sum of the invoices is nearly twice that amount. To provide for the loss in value of the work to TS, I am prepared to deduct $2,000 from the sum owed.

42. The hours of rectification work were not disputed by DF and nor was the value that was attributed to those hours of $70/hour. As no invoice is presented in relation to those works, it does not follow that GST should be added. Therefore, TS may deduct $3,640 from the sum owed for the cost of its own work in completing the project.

43. I also accept the evidence of TS that the cost of the engineering drawings to correct the work was $1000. This is also deducted from the sum owed.

44. Finally, there was an opportunity cost in the time delay for completion of the work, which also goes to the benefit obtained from the contract by TS. There was no documentation supporting TS's calculation that it lost $6,500 of profit in relation to the time delay. Given the limited nature of the evidence presented on this matter, I limit the sum attributable to this cost to $1,000, which also is to be deducted from the sum owed.

45. The sum owed is $13,827.15. The total deductions are $7,640. The sum remaining to be paid is $6,187.15.

46. For these reasons, TS is to pay DF $6,187.15 by the date stated in this order.

Referee: **T Baker**
Date: **21 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 of 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.