



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 603

APPLICANT **L Ltd**

RESPONDENT **T Ltd**

The Tribunal orders:

T Ltd is to pay L Ltd \$10,432.95 on or by 10 November 2023.

Reasons

1. T Ltd is a property developer which relocated two houses to a site near [Town]. T Ltd employed L Ltd to initially carry out repair work to damage which occurred during the house shifting process. The appointment occurred due to another builder becoming unavailable at the last minute. L Ltd was then retained to build decking, do landscaping, and conduct other building work necessary for the house to achieve Council compliance.
2. There was no contract signed between the parties which set out the terms of the arrangement, rather L Ltd was directed to do work, which was then periodically invoiced. There is no dispute as to the quality or completion of the work, rather T Ltd disputes the invoices for the work produced by L Ltd. These challenges are to charges for materials and the markups applied.
3. The work was completed between February and July 2022. Five invoices for the work up to 13 July 2022, totalling \$51,852.20 were submitted and were paid. A final invoice dated 11 August 2022, remains unpaid. This invoice was initially for \$15,456.84, but has been adjusted downward to \$14,996.84.
4. L Ltd claims that T Ltd has breached the agreement to pay the invoices for work and claims \$14,996.84.
5. T Ltd for its part claims that it has been overcharged for materials over all the invoices. It says that the discrepancies in material charges mean that the outstanding invoice should be reduced by \$10,026.74. T Ltd also claims that the amount should be reduced further due to a loss of interest earned on overcharged money, the administration work in challenging the invoice, and legal costs.
6. Hearings were conducted on 21 April, and on 15 June 2023. At the close of the second hearing, I issued a direction that there were materials which had been charged to T Ltd which were not captured by the [Supplier 3] invoices supplied. These materials include; flashings, timber, gibboard, and spouting. These were either obtained from suppliers other than [Supplier 3], which is L Ltd's main trade supplier, or were un-invoiced cash purchases. These other suppliers included [supplier 1], [supplier 2], and purchases of gib board off [Online auction

website]. These were to be provided by 14 July 2023. No further information was provided. Therefore, I have closed the hearing, and this decision will resolve the matter

Issues

7. The issues I need to resolve are:
 - a. What is the contractual arrangement between the parties relating to markups on materials?
 - b. What is a reasonable amount due on the invoices?
 - c. Can T Ltd's costs be awarded?

Contractual arrangements

8. L Ltd explains the difference between the material invoices supplied and the amounts charged to T Ltd are due to a markup. T Ltd says no markup should be applied. There was no contractual document setting out the terms of the relationship. However, a binding contract can be formed even when it is not recorded in writing.
9. The law of contract requires that people should keep promises that they legitimately agree to. This has led to the following characteristics of a contract being identified:
 - a. there needs to be clear communication between the parties of an offer to provide a service or product and acceptance of that offer;
 - b. there needs to be consideration, in this case the provision of services in exchange for the payment of money;
 - c. certainty of terms; and
 - d. intention to create legal relations, in other words a commitment to the promises made.
10. In the current case there was clearly an agreement that L Ltd would provide building services, and T Ltd would pay for those services. This is evidenced by the completion of building work by L Ltd, and payment of previous invoices for that work by T Ltd. The work and the payment are evidence of offer, acceptance, and consideration. There was also clearly an intention to create legal relations, shown by the work and payment.
11. There is more difficulty around the certainty of terms, particularly around L Ltd's alleged markup for materials. Often such markups are specified in a head agreement, however, a party may indicate acceptance of a situation by its conduct. I note that the initial invoices of 10 March, 15 April, 15 May, and 8 June 2022, were not disputed at the time. However, the earlier invoices were for work which was relatively materials light, compared with the later invoices. A complicating factor is that the later invoices also include materials purchased during earlier invoicing periods, where the supplier had not yet invoiced L Ltd.
12. It is reasonable for T Ltd to expect that costs passed on to it will be backed by evidence, at the very least some detail as to what the materials were and a more detailed explanation as to the breakdowns of those materials. While I cannot discern or imply such a term, this is normal industry practice.
13. I cannot conclude that there was a contractual term regarding markup on materials. However, my experience in other construction heavy Tribunals is that a builder's markup of 10% on materials is commonplace in the industry. This is a fair and reasonable markup and is the rate I will apply.

The reasonable amounts due on the invoices

14. I have the difficulty here that the invoices do not provide a breakdown of the material component. Rather suppliers' invoices have been provided, well after L Ltd's invoices were submitted. T Ltd has calculated the materials cost across all invoices, and on a month-by-month basis. I do not consider this approach to be overly helpful, as that is not the periods in

which the invoices were submitted. Rather, I will consider the invoices for each of L Ltd's invoicing period and will consider what is reasonable for each. I will add a 10% mark-up for the materials which are proven for each month. Where no supporting material invoices have been supplied which justify the materials claimed I will deduct those amounts unless, in the correspondence or at hearing, a reason has been given for the unexplained material costs.

March 10, 2022

15. The March invoice includes \$4,326.43 (inclusive) for materials with the description "*materials so far for rear house only*". The materials supplied on invoice up to 7 March 2022, were for \$3,741.74. With a 10% markup this equates to \$4,115.91. This leaves an unexplained material cost of \$210.51.

15 April 2022

16. The April invoice includes \$1,617.33 (inclusive) for materials with the description "*materials for back house, soffits & front door timber*". The material supplied on invoice up to 14 April 2022, where for \$1,270.90. With a 10% markup this equates to \$1,281.37. This leaves an unexplained material cost of \$335.96

15 May 2022

17. The May invoice includes \$3,665.36 for materials with the description "*back deck*", and \$4,715.74 for materials with the description "*fence not including concrete which is next month invoice*". The materials supplied on invoice up to 15 May 2022 were for \$10,923.13. With a 10% markup this equates to \$12,015.44. This leaves an excess material cost of \$3,634.34.

8 June 2022

18. The June invoice includes \$10,215.90 (inclusive) for materials with the description "*decking, fencing & retaining timber et cetera*". The materials supplied on invoice up to 8 June 2022 were for \$2,804.88. With a 10% markup this equates to \$3,085.39. This leaves an unexplained material cost \$7,130.53.

13 July 2022

19. The July invoice includes \$8,046.04 (inclusive) for materials with the description "*front house index, baseboards, weatherboards, channel & greats, bagged concrete for decks & [employed landscaper]'s posts and deck materials*". The reference to "*[employed landscaper]'s posts and deck materials*" refers to a landscaper employed by T Ltd separately, who used L Ltd's trade account to purchase materials. The material supplied on invoice were for \$9,644.05. With a 10% markup this equates to \$10,608.45. This leaves an excess material cost of \$2,562.41.

11 August 2022

20. The August invoice includes \$8,772.60 (inclusive) for materials with the description "*remainder of materials for T Ltd RD including credit of retaining timber and pegs*", and \$1,509.24 with the description "*colour steel spouting and brackets*".
21. At the second hearing the colour steel spouting and brackets were discussed. L Ltd was directed to provide invoices from [Steel Company] but failed to do so. There are no supply invoices to back this amount. This leaves me with a difficult issue to resolve; as the amounts claimed for the spouting and brackets are reasonable, based on amounts I have seen in other claims, but no evidence of the cost of these materials has been supplied. The work completed included installing spouting and brackets. I concluded is reasonable to include this amount in L Ltd's favour.

22. The material supplied on invoice were for \$3,662.54, with the inclusion of \$1,509.24 for the colour steel elements, this totals \$5,171.78. With a 10% markup this equates to \$5,688.96. This leaves an unexplained material cost of \$3,083.64.

Summary

Taking the above into account there is an unexplained additional material cost of \$4,563.89. I conclude that this amount should be deducted from L Ltd's invoice. This adjustment means that T Ltd owes \$10,432.95.

T Ltd's costs

- 23. T Ltd has also claimed a loss of interest earned on overcharged money, the administration work in challenging the invoice, and legal costs.
- 24. The administration and legal costs are barred by S 43(1) of the Disputes Tribunal Act 1988, unless they are awarded against the party who has behaved vexatiously or frivolously. That is not the case here, therefore I cannot make this award.
- 25. Under S 20 Disputes Tribunal Act 1988, interest may be awarded by the Tribunal when an order for payment is made. There is no contingency in the act to adjust an award down to allow for interest. Therefore, T Ltd's claim for loss of interest must fail.

Referee: C D Boys

Date: 13 October 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>.