



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2020] NZDT 1323**

**APPLICANT      WQ Limited**

**RESPONDENT    ND Limited**

**The Tribunal hereby orders:**

ND Limited is to pay WQ Limited \$15,548.84 by Friday 27 November 2020.

**Reasons**

1. WQ Limited were engaged as a subcontractor for ND Limited to do the plumbing work at [redacted] School. WQ are claiming the amount owing under unpaid invoices being \$10,336.08, \$4,319.32 and \$893.44 (total \$15,548.84). It is also claiming interest on that amount.
2. In my order of 10 July 2020, I struck out ND's counterclaim (filed on 29 June 2020). That counterclaim says WQ overcharged for the work done in relation invoice 2694 for \$7,747.93. In my order of 10 July 2020 I said:

I have struck out that claim because the subject matter of that claim was determined by the Building Disputes Tribunal on 30 March 2020 (section 17(2), Disputes Tribunal Act 1988).

3. It is useful to set out the timeline of the events which I have done as follows:
  - a. 15 January 19 - The contract was signed.
  - b. Just after that date WQ started the works.
  - c. 25 January 19 - WQ issues an invoice (#2687) for \$10,336.08.
  - d. 11 February 19 - WQ issues an invoice (#2694) for \$7,747.93.
  - e. 1 March 2019 - WQ serves ND a stop work notice on ND for non-payment.
  - f. 2 March 2019 - ND sends an email to WQ listing various problems including referring to timesheets not being provided.

- g. 4 March 2019 - ND pays the invoice 2694 (\$7,747.93) saying they were "bullied" into paying because of the stop work.
- h. 7 March 2019 - This is the last day WQ worked at the school as shown by the invoice entries. There was a gap between 7 March until 13 March. WQ says 13 March was to come back and fix a leak.
- i. 20 March 2019 WQ issues an invoice 2764 for \$4,319.32.
- j. Various emails from WQ chasing payment of invoices.
- k. 30 April 2019 - WQ issues an invoice (#2822) for \$893.44.
- l. 13 May 2019 - WQ files its claim with the Disputes Tribunal.
- m. 12 July 2019 – First Disputes Tribunal hearing. There was no appearance by ND. The Tribunal made an order in favour of WQ.
- n. 4 December 2019 – A rehearing was granted following an application by ND that it did not receive notice of the hearing.
- o. 7 February 2020 – The new hearing was adjourned by Referee Reuecamp. In the adjournment order Referee Reuecamp did not approve Mr Marcus Khal as a representative for ND in the hearings.
- p. 17 February 2020 – ND obtains a Quantity Surveyors report.
- q. 18 February 2020 – ND files claim with Building Disputes Tribunal (BDT). ND claimed that WQ overcharged for the work they did and was seeking \$3,494.76 being the difference between the amount they had paid WQ and the amount they say they should have paid
- r. 25 March 2020 – WQ obtains a Quantity Surveyors report.
- s. 30 March 2020 – The BDT Adjudicator (Mr John Beech) dismisses ND's claim.
- t. 29 June 2020 – ND files a counterclaim with the Disputes Tribunal.
- u. 10 July 2020 – I struck out ND's counterclaim (see paragraph 2 above) and adjourned the hearing in relation to WQ's claim.

*ND's assertion that VCL overcharged it*

- 4. ND also say VCL over charged for the work done and didn't do all the works. As mentioned above I had struck out ND's counterclaim. This was covered in Mr Beech's determination based on ND's then argument that there was an estimate.
- 5. At the last Disputes Tribunal hearing this was raised yet again by ND. I feel the need therefore to address this point. ND produced its Quantity Surveyors report from Mr Nigel Emmitt. This was also available when Mr Beech gave his determination. WQ also provided a Quantity Surveyors report from ESL (NZ) Ltd but Mr Beech received that report very late and therefore that report was not considered.
- 6. Mr Beech did however comment on Mr Emmitt's report as follows:

ND provided a report ... to establish the cost of the Works and presumably to support its claim there was an agreed estimate of costs. The report does not assist because it does not record the instructions upon which the survey was taken, it does not state whether this relates to all or part of the Works, and certainly does not

include all of the parts and materials for which invoices have been rendered... [paragraph 25 e. of Mr Beech's determination]

7. I agree with Mr Beech's comments in relation to the information he had at the time. However, after his determination and for the purposes of the Dispute Tribunal claim, ND provided a written witness statement from Mr Emmitt dated 28 June 2020. At paragraph 5 of that statement Mr Emmitt says he had been asked to review "the Invoices supplied by...VPL toward costs and completion of Contract works" [emphasis added]. Mr Emmitt goes on to say at paragraph 6d:

In conclusion, VPL should have been paid \$3,697.60 [plus GST] for the work it carried out as identified within its invoices claimed against [ND].

I conclude therefore that the figures in Mr Emmitt's report totalling \$3,697.60 plus GST related to all the invoices issued by VPL.

8. In contrast the Quantity Surveyors report from ESL (NZ) Ltd estimates the value of the works based on the invoices and rates from *QV costbuilder* (which is a site giving members access to building cost data). ESL's estimate came to \$24,090.17 (excl GST) which is \$27,703.70 (incl GST). VPL's actual invoices totalled \$23,296.78 (incl GST).
9. The estimate difference between the two reports is significant. It is extremely unlikely that VPL's estimate (assuming there was one) could be anywhere near what Mr Emmitt's report claims and as Mr Beech pointed out in his determination the parts and materials alone would have far exceeded the estimate.

#### *The Contract*

10. In relation to the contract between the parties the main terms of the contract dated 15 January 2019 are:
- a. To do "carry out the Contract Works which comprises **Plumbing** Work including the trade work in accordance with and as identified on plans for the Principal's Business or Project at [redacted] Sch..." (Recital A. of the contract). The works related to the Administration and Student toilets at the school.
  - b. To carry out the works with skill and complete the works.
  - c. The price is at an hourly rate of \$75.00 plus GST.
  - d. That ND will pay for the works as they fall due.
11. The [CEO of ND] pointed to additional contract terms which were submitted in evidence by ND. These are headed "MK992:2017 Conditions of Sub-Contract for Commercial Construction (New Zealand). WQ say they didn't get these terms. ND says the terms in the additional contract terms was one of the reasons why the outstanding invoices have not been paid.
12. They point to clauses 1.3(b) and 13.5 saying those clauses in the additional contract terms required WQ to provide timesheets and because WQ did not supply the timesheets they were not paying.
13. Clause 1.3(b) says:
- ...where the Sub Contractor carries out any works on a time computation, day works or charge up basis...no amount shall be payable to the Sub Contractor in the absence of signed time sheets by the Sub Contractor[']s personnel and verified and signed by the Head Contractor[']s representative together with specific proof of payment from the Sub Contractor toward the individual performing the contract work.
14. Clause 13.5 are provisions relating to charge up work. More specifically subclause a.i. says works are to be on a time computation basis in accordance with clause 1.3 (a), (b) and (c). This refers back to clause 1.3(b) recited above.

15. The document WQ signed is headed "Formal Instrument of Agreement" and clause 4 of that document refers to the Conditions of Sub Contract MK992:2016 and other things such as the plans. Clause 3 however refers to MK992:2017. As mentioned above WQ say they did not get the Conditions of Sub Contract.

16. I make the following comments:

- a. The contract is an ND contract. It is not a standard master builders' contract.
- b. The reference to the Conditions of Sub Contract (in the Formal Instrument of Agreement) which is said to form part of the contract is not clear – it refers to both the 2016 and 2017 versions. The Conditions of Sub Contract submitted in evidence by ND is the 2017 version.
- c. In an email dated 17 January 2019 where ND emails the contract to WQ it says:

Please find our standard sub contract agreement for you to sign and return...

Please ensure the Plumbers are aware of our "School Policy" attached at the rear of [the] agreement.

...

The "School Policy" is included as part of the Formal Instrument of Agreement) at the end of Schedule 1. Nowhere in that email does it refer (or suggest) that the Conditions of Contract were attached to that email. I conclude that it is likely that WQ did not receive the Conditions of Sub Contract.

- d. I do not accept ND's argument that the Conditions of Sub Contract were on site (assuming they were) to be read. It is usual for plans to be on site, not the terms of a legal contract. If they were there is nothing to suggest the persons authorised to accept those terms would have or could have seen them.
- e. Assuming the 2017 terms applied, I make the following points:
  - i. Even though timesheets were not provided the invoices provided by WQ were very detailed. For example, in the invoice dated 25 January 2019 it sets out the date the tradesman worked, the hourly rate, the discount and the price charged. It is very easy to work out how long the tradesman worked on a particular day.
  - ii. Invoices were issued on 25 January 2019 and 11 February 2019 yet there were no emails from ND about providing timesheets until 2 March 2019 which was the day after WQ served ND a stop work notice on ND for non-payment.
  - iii. In its email of 2 March 2019 (which was a Saturday) ND refers to conversations they had with WQ on the Friday (1 March, being the day WQ served the stop work notice) and allege various things including that the tradesman was not on site all the time, charging for a Kango hire which ND said ND supplied, a staff member was regularly seen on the phone and that it was "believed such time was charge to ND." There is no evidence on balance to support those allegations. It is common for tradesmen to leave a site to collect supplies, for example. Also, to have a belief that time was charged is not sufficient.
- f. Even if there was a breach by WQ under the contract, there is no evidence that ND suffered a loss or would have otherwise been entitled to damages.

17. For the reasons above and on the evidence before me I find on balance that WQ is owed the amounts set out in the outstanding invoices.

*Is WQ entitled to interest on the amount owed?*

18. WQ is also claiming interest on the amount owed compounding at 2.5%. In this regard WQ refers to its own terms and conditions of trade which states that WQ is entitled to such interest. However, ND is not a party to WQ's contractual terms and therefore is not liable to pay such interest under WQ's contract. The WQ/ND contract is also silent on interest payable by ND for late payment. I note that there is an interest clause in the Conditions of Sub Contract but that is drafted for the benefit of ND.

**Conclusion**

19. For the reasons above ND must pay WQ \$15,548.84.

**Referee: Ms G Jaduram**

**Date: 10 November 2020**



## 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 28 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 28 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 28 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>.