



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

[2023] NZDT 600

**APPLICANT**      **BF**

**RESPONDENT**    **QT**

**The Tribunal orders:**

1. QT is to pay BF \$1,100.00 by Friday 24 November 2023.
2. Upon payment by QT as per order 1, BF is to return the pump, lay flat hose and camlocks to Mr T immediately, by arrangement with him.
3. All other claims are dismissed.

**Reasons:**

4. BF attended the hearing by teleconference. Mr T, for QT, also attended the hearing by teleconference.
5. The hearing was held in two parts — on 2 August 2023 and on 19 October 2023. BF's husband, CF was also present at the hearing on 19 October 2023 as BF's support person.
6. BF and her husband engaged Mr T, who owns QT, to maintain their pool and put in a new pool liner, as their pool appeared to be leaking. They said Mr T, despite giving them a quote in March 2022, did not start work on the pool liner until 8 November 2022 when he drained their pool of most of its water and then removed the old pool liner on 5 December 2022. When the pool liner was removed, there was damage discovered to the pool. BF filed an insurance claim relating to the pool damage, which was declined. She then claimed \$30,000.00 from QT, which was the maximum amount able to be claimed in the Disputes Tribunal, as contribution towards the cost of a new pool, which she said was required due to QT's actions.
7. Mr T for QT counterclaimed for \$2,276.97, which was amended during the hearing to \$2,217.80, for items he said he ordered for the BF's pool job, but which he now could not use or resell, less the deposit paid by BF for the pool liner.

*Were the services provided with reasonable care and skill?*

8. BF said initially Mr T's maintenance of the pool was good, but it became very hard to get him to the property to replace the pool liner, or get much information from him about why. She said the liner was not ordered by him until July 2022, despite him quoting them and them accepting his quote in March 2022. BF said they paid \$1,100.00 deposit for the liner in July 2022.

9. Mr T said he sent the Fs a quote in March 2022. Mr T maintained he was instructed to work in with the builder and that he only orders a pool liner when it is due to go in. He said he did not provide a time frame for the job but was reliant on the builder. He said he received a text from the builder on 22 June 2022 that the builder was starting the decking, which was the green light for Mr T to start his process. Mr T said he went to the site the following week to discuss the job with the builder and that he told the builder on many occasions that Mr T would need a dry site to replace the pool liner. He asked the builder to drill bore holes close to the pool so Mr T could monitor the water table, which the builder did.
10. Mr T said from July to October 2022 he would check around once a week if he could, to see the water table level. He maintained there were periods of heavy rain over this period and so he did not see the point of checking the water table levels in that case. He explained that the water table was finally low enough on 8 November 2022, so he started to partially drain the pool. He said he drained it to the level he was trained to do at his QQ trainings– at the level of the earth/ground outside and around the pool. He said he left around 200-300mm of water to ground level so there would be equilibrium inside and outside of the pool, which would provide the pool with enough support. He said the deck was 700mm on top of the pool, as it was not an inground pool. He confirmed he first touched their pool to begin the liner replacement process on 8 November 2022. Mr T said he had attended specialty QQ trainings regularly for 10 years. He stated there was constant rain after he drained the pool, so he revisited the site next on 5 December 2022 to remove the old pool liner. When he had done so, he discovered three creases in the northern wall of the pool, and pointed this out to BF, who was at home at the time. He quoted her \$600.00 to fix the damage but she told him she wanted to file an insurance claim instead as it might be earthquake damage.
11. Mr T said he emailed BF on 8 December with information for her insurance claim, giving her a like for like quote to replace the whole structure and start again, which came to \$16,545.00, including a MQ only package, removal and installation of the new structure including concrete, sand, labour, vehicles and sundries. He said he did not hear back from BF after 9 December 2022, other than a text from her builder, whom he called. He stated the builder told him BF was over it and did not want Mr T back on site.
12. Mr T emphasised that when an insurance company is involved, he is not allowed to touch anything until the assessor has been and that he left the old liner on site for the insurance assessor to view. He added that he told BF and her husband on multiple occasions that putting in a pool liner is weather dependent, that the water tables had to be low enough, and said the region had the wettest spring and summer since records began.
13. BF said Mr T did not visit the site at all from 22 June to 2 August 2022, nor did he check or come out to their property to look at the water table. She provided weather charts indicating days without rain over this period. BF said the representative from CQ told her there was not enough water left in the pool, as did the insurance assessor. However, she did not provide any written confirmation from CQ of this.
14. Based on the evidence that the water table had to be sufficiently low for work to start and the region experienced significant heavy rain over this period, Mr T's evidence of his QQ training about how much water had to be left in the pool to provide sufficient structure for the pool until the pool liner was removed and reinstalled, and the short amount of time between Mr T partially draining the pool on 8 November 2022 and then removing the old liner on 5 December 2022, I find there to be insufficient evidence to prove it more likely than not that Mr T and QT did not use reasonable care and skill in providing their services.

*Was there any existing damage or deterioration in the pool that would have affected the services being able to be carried out with reasonable care and skill?*

15. BF said she did not know if there had been any damage underneath the pool before Mr T began work on the pool. She knew the water levels in the pool were dropping so thought there was a leak.

16. Mr T said the pool likely was leaking as the F's had told him the water was often dropping below the bolt on the skimmer box, which is a sign the pool was leaking. He said when he took the liner out it showed white blotches, which was chlorine burning, which removes elasticity and makes it porous. He said it had wrinkles, which means water has been under the liner. He maintained there was water showing under where the liner had been, once he removed the liner on 5 December 2022, and provided a photograph of this. There were no photographs provided by either party of the condition of the pool between 8 November 2022, when much of the water was drained from the pool, and 5 December 2022 when the old liner was removed.
17. BF pointed to photographs of the pool after the old liner was removed, which showed walls bending in. Mr T said that was the pool design, that the para pool is oval and its walls are arced.
18. I have found above that there was insufficient evidence to prove that QT did not provide its services with reasonable care and skill. On the evidence outlined above however, I find it likely the pool was leaking before QT became involved with the pool.

*Was the pool left fit for purpose?*

19. BF provided her insurance report from the assessment completed on 9 January 2023, where the insurance assessor believed "the damage is as a result of unstable framework over a prolonged period (gradual damage) of time from a lack of water in the pool to support the frame. This has allowed the pool to flex out between the supports and also slump at the base."
20. Mr T disagreed with the insurance assessor and said that type of pool has legs concreted in and he could have repaired the damage discovered but BF wanted to file an insurance claim instead.
21. Mr T pointed out the assessor visited the pool 26 days after he removed the old liner on 5 December 2022 but they pointed out the damage to the wall had likely occurred over a long period of time. He further highlighted that, contrary to his specific instructions to the F's and their builder not to touch or remove anything in the pool without his approval, the white seats in the pool had been removed and the clips taken off by somebody without his consent or approval. He said these were only supposed to be removed when the liner was installed. He said further that the white capping around the pool edge was also removed by their builder, not him.
22. Neither BF nor her husband knew who had removed the seats and clips from the pool but assumed that that would not have been done by their builder unless Mr T had told him to do so. BF confirmed they had only topped up the water in their pool twice since moving into the property in January 2022.
23. BF said she was not left with anything fit for purpose after Mr T's removal of the old pool liner.
24. Mr T said he was not able to do anything further after the insurance assessor was involved, even though he could have repaired the damage for \$600.00 and then continued, that he then was told BF did not want him on site anymore and then said he did not hear further from the F's until this claim was filed.
25. I note that the pool was likely leaking before QT took the job, that the F's had only topped up their leaking pool twice since January 2023, that the insurance assessor's opinion was that the pool damage was gradual damage that came about over a prolonged period, that Mr T only partially drained the pool on 8 November 2022 to the level he was trained to do so and then removed the old liner on 5 December 2022 when the damage became apparent, which is only about 27 days apart and likely too short a time to cause the damage. I note further that the pool's seats and clips and capping were removed by somebody other than Mr T. Based on this evidence, I find the pool was likely not fit for purpose but that there is insufficient evidence to prove this was due to QT.

*Were the services provided within a reasonable time?*

26. BF believed that from 23 March 2022 to 20 January 2023 was an extremely unreasonable period to wait for service. Even taking a date from 22 June 2022 given by Mr T for him to be able to start the process, she said that is several months with no visit to the site or checking by him of the water table. She explained she had no contact with Mr T after he took out the old pool liner and pointed out the pool's damage to her, after which she went the insurance claim route. She emailed Mr T on 20 January 2023 but had no reply from him, she waited for longer to hear back from him and finally filed her Tribunal claim in June 2023. She said she was told she would have to take out the pool fencing, for which she had paid \$15,000.00, unless she did something with the pool area and so eventually decided to have a new pool put in. She said she likely would have gone for the like for like quote of around \$16,000.00 if Mr T had got back to her but he had said in an email he would not do another liner so she did not think that was an option at the time.
27. Mr T responded that from July to 8 November 2022, from when the builder told him he was ready to do the decking around the pool and Mr T could start the pool process, until when he drained the pool, there were texts from the builder confirming the amount of water at the property and the bad weather at the time. He said, due to the ongoing heavy rain in the region, the water table was constantly too high to start work. He was not prepared to take the risk of removing the liner with a high water table level, as that would have compromised the pool structure and potentially led to damage of the pool, in his view. He said his insurance would not cover him in such a situation. He provided a letter from a company that installs QQ in the [Region], M Ltd dated 22 August 2023 saying that due to extremely high rainfall over the past two years, even before [cyclone] effects, they have only installed about 14% of the number of pools they would normally install. They confirmed further in their letter that, with an elevated water table, it is difficult, near impossible, to install new pools.
28. BF said she understood there was heavy rain over this period but Mr T told them he needed a week of dry weather to install the pool liner and her weather charts provided showed there were periods of a week of dry weather.
29. Mr T said he alluded to a week of dry weather to install the pool liner, given the water table level was alright. He said he had visited their property several times when nobody was at home to monitor the water table level there and it had been too high.
30. I accept that Mr T could only begin his process from around June/July 2022 after instructions to him to work in with the builder and with the builder telling him around June/July 2022 that the builder was starting on the pool decking. Therefore, I consider whether the period from June/July to 8 November 2022, when he began work, was an unreasonable time in these circumstances. I consider that, after 5 December 2022 when the old liner was removed and the damage discovered, when BF made an insurance claim, QT's involvement was effectively put on hold. The insurance report was not available until January 2023, when the claim was declined, then Mr T was told the F's no longer wanted him on site on 18 January 2023. Mr T said he then did not receive BF's email of 20 January 2023, which I accept. Thus, I do not consider the period after 5 December 2022 in deciding whether QT were unreasonable in time in providing their services.
31. I have reviewed the weather charts provided but also note Mr T's evidence that the water table level is the key factor in whether work can proceed, rather than whether there is rain at any time. Other than Mr T's verbal evidence, there was no other evidence provided about the water table levels at the F's property from July to 8 November 2022. I accept Mr T's evidence from M Ltd that this was a period over which it was challenging for other pool services providers to install pools due to the unusually heavy rainfall. I find it likely, however, that the time it took for Mr T to start work, was an unreasonable time of 4/5 months. I find Mr T likely did not make sufficient effort to actively keep his clients informed of his checks and the water table levels over this period, which I consider to be part of the services provided. However, I find further that, based on other evidence, the time it took to start work likely would not have changed the result of the pool damage, as there were only around 27 days between Mr T partially draining the pool and removing the old pool liner.

*Was any failure one of substantial character?*

32. BF thought there was failure of substantial character and said she was left with a pool substantially unfit for purpose and had to wait for an unreasonable time for Mr T to start his work.
33. Mr T did not believe there was a failure of substantial character.
34. I have found BF has not proved that QT likely failed to provide its services with reasonable care and skill or that QT's actions likely caused any unfitness for purpose of the pool. I have found further that it was likely the services were not provided within a reasonable time but that it is likely this would not have changed the outcome about the pool damage. Given this, I do not need to make any findings as to whether any failure was one of substantial character.

*Were the F's losses reasonably foreseeable as likely to result from any failure in service?*

35. BF said the losses reasonably foreseeable as related to failure in service were in the period up to the insurance claim being filed. She knew Mr T had to pause his work once the insurance claim was filed. She believed there were plenty of opportunities for Mr T to do the work before then and provided weather charts of the rainfall in the region over the period in question, showing periods of days between rainfalls where he could have started work.
36. I have found above there was likely a failure to provide the service within a reasonable time but that this failure would not have affected the outcome, and that the pool was likely unfit for purpose but likely not due to QT's actions. Therefore, I do not need to consider whether any costs were reasonably foreseeable as liable to result from a failure.

*Were the F's reasonable in cancelling the contract with QT?*

37. BF said they engaged Mr T on 23 March 2022 and had problems getting any information from him on when the pool liner would be installed, at times only receiving rude, abrupt responses from him. She said they tried to re-engage with him after their insurance claim was declined but did not have any response from him. She assumed he did not want the job as they did not hear back from him. She said they cancelled the contract with QT around 21/22 February 2023 and signed a new pool contract in March 2023. No documents were provided to confirm any cancellation of the contract in February 2023, however.
38. Mr T said their builder told him on 18 January 2023 that BF did not want Mr T back on the property. He believed the contract was cancelled then. He was not given an opportunity to respond then. He said had he received BF email of 20 January 2023, setting out her situation and proposals that he pay costs, it would be different, but he had not. He said he followed up with his internet service provider as to why he did not receive this but had no answer back.
39. I find that it was likely reasonable for the F's to cancel the contract with QT, as they had not heard back from Mr T and had pressing reasons to get a new pool organised. Mr T considered the contract cancelled as of 18 January 2023.

*What remedies, if any, are appropriate?*

40. BF claimed \$30,000.00. She provided quotes for new swimming pools of \$68,760.00 and more. She said she claimed the maximum allowed by the Tribunal's jurisdiction.
41. Mr T pointed out that the F's have signed with a new pool provider but, as at the hearing date of 19 October 2023, their new pool still had not been completed when they signed in March 2023. BF said this was due to a staff shortage and not the weather. Mr T said the new pool ordered was far superior to the pool that had been in place when he started work and that the F's had

also ordered all the 'bells and whistles' as extras for the new pool, many of which they did not have in their original pool, including a heater. He did not believe he should have to fund half the cost of their new pool, especially as their old pool had been 30-40 years old. He maintained he could have repaired the pool damage for \$600.00 and they would not have been in this position.

42. Mr T initially claimed \$2,276.97, which he said included the cost of a new liner at \$1,382.61, coping strips at \$151.20, ground cover at \$78.96, pump at \$139.00, lay flat hose/camlocks at \$394.36 and his invoice for work completed at \$929.78, for a sub-total of \$3075.91. He then deducted the deposit of \$1,100.00 paid by the F's. He amended his claim to \$2,217.80 at the hearing.
43. The parties agreed that Mr T has the pool liner, coping strips and ground cover whereas BF has the pump, lay flat hose/camlocks. BF said Mr T is welcome to the items left at her property and can resell the liner and ground cover.
44. I have found that BF has provided insufficient evidence to prove that the services provided by QT were not provided with reasonable care and skill or that their actions provided a pool that was unfit for purpose. I have found it likely the services were not provided within a reasonable time but that that failure would likely not have affected the outcome of the pool damage. Therefore, I dismiss BF's claim for \$30,000.00.
45. I have found further that it was likely reasonable for the F's to cancel the contract with QT, as they had not heard back from Mr T and had pressing reasons to get a new pool organised. Therefore, I also dismiss QT claim for the items they were left with after the contract was cancelled. In the circumstances, these items can likely be used or sold. I find it reasonable that QT is to return the deposit paid by the F's of \$1,100.00 to them, given the new pool liner was not installed and thus the services were not completed.
46. QT is to pay BF \$1,100.00 by Friday 24 November 2023.
47. Upon payment by QT, BF is to return the pump, lay flat hose and camlocks to Mr T immediately, by arrangement with him.

**Referee: C Price**  
**Date: 30 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>.