



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2024] NZDT 654

APPLICANT	BS
APPLICANT	WQ
RESPONDENT	K Ltd
SECOND RESPONDENT	T Ltd
THIRD OR SUBSEQUENT RESPONDENT	N District Council
THIRD OR SUBSEQUENT RESPONDENT	U Ltd

The Tribunal orders:

1. K Ltd and T Ltd are to pay BS and WQ \$8,000.00 on or before the 15 November 2023.
2. The claim against N District Council is struck out.
3. The claim against U Ltd is struck out.
4. The remainder of the claim is dismissed.

Reasons

Introduction

1. T Ltd and K Ltd entered a contract for K Ltd to build a house for T Ltd. T Ltd provided the plans. On completion of the house T Ltd sold the property to BS and WQ.
2. The property was part of a subdivision that had been approved by the N District Council ('the Council') on plans provided by the developer. The plans included the ground contours and how the ground level changed during the subdivision. In approving the subdivision, the council accepted the existing drainage patterns were not substantially different to the original drainage pattern.
3. When the house was built, the drainage pattern for the property changed. Two retaining walls with drainage behind them was installed at the rear of the property. The rear of the property floods between the retaining walls and the house. The flood water runs off the property into the neighbouring property instead of to the front right of the property.

4. BS and WQ seek \$29,704.50 to remedy the flooding by removing the existing top soil and stones, removing clay, installing five(5) cesspits connected to the stormwater, putting in new topsoil and hydroseeding.
5. The issues to be resolved are:
 - a. What work was carried out to restore the ground contour for the natural flow/drainage on the property?
 - b. Was this work completed with reasonable care and skill?
 - c. Are BS and WQ entitled to claim \$29,704.50?

What work was carried out to restore the ground contour for the natural flow/drainage on the property?

6. The Building Act 2004 implies that warranties into contracts for building works that include the requirement that “the building work will be carried out in a proper and competent manner; and in accordance with the plans and specifications set out in the contract; and in accordance with the relevant building consent”, and “that building work will be carried out with reasonable care and skill”. Building work includes all siteworks associated with the new development including drainage.
7. The issue of the flooding in this matter relates to natural flow of water and its drainage from higher ground and rain. It does not relate to the drainage of water captured by the roof.
8. U Ltd worked solely on the drainage in relation to capture of water on the roof. The earlier drainage work done on the subdivision was carried out by a different company. I find that there is no claim against U Ltd and therefore the claim against them is struck out.
9. I find the claim against the Council is not relative to the matter in as much the Council in its regulatory capacity approved the drainage work and the changes to ground level contour as part of the subdivision. That ground contour was later changed and not part of any further requirements of the Council under their regulatory capacity, therefore the claim against the Council is struck out.
10. The work that was done that changed the ground contour was undertaken by K Ltd under contract with T Ltd. T Ltd advised that the house plans were provided to K Ltd by them.
11. K Ltd organised the clearing and levelling of the area to build the house. In the process, K Ltd put in two retaining walls at the rear of the property. Drainage was included in building of the retaining walls.
12. K Ltd then contracted [Lawn Services Company] to apply topsoil and hydro seed the property where it had been cleared. K Ltd advised, and it was not denied by T Ltd, that the agreement was for minimal landscaping in as much that the topsoil and hydroseed would be enough. K Ltd accepted with the change of the contour that the drainage/ water run off should have led to the water running off the front of the property.
13. I find that the work completed to attempt to restore the ground contour for the natural flow/drainage on the property was the application of the topsoil and hydroseeding. This did not restore the ground contour.

Was this work completed with reasonable care and skill?

14. I find this work was not completed with reasonable skill and care for the following reasons:
 - a. As evidenced by the photographs, the water pooled at the rear of the property.

- b. I accept the evidence of WQ and BS that some of the topsoil was washed into the neighbour's place and that flood water drains through their neighbour's property instead of to the front of their property. When I compare this to the contour plan and the acknowledgment by K Ltd that the water should drain to the front of the property; it clearly shows that the restoration of the contour has not remedied the contour of the land when the retaining wall was erected, and the site cleared to build on. The ground level contour has been substantially changed and not restored.
- c. I do not accept the argument by K Ltd and T Ltd that the pooling has been caused by a lack of lawn maintenance, because when K Ltd spoke to a drainlayer, and BS and WQ to the council, both independently were advised to fix the pooling problem would require the installation of catchpits connected to the current storm water systems. Neither party or the independent quote from [Drainage Company] say that top soil and hydroseeding and lawn maintenance alone would fix the problem.

Are BS and WQ entitled to claim \$29,704.50?

- 15. Section 362M of the Building Act 2004 provides options where there has been a breach of warranty. BS and WQ did notify the parties that there was a drainage problem. There was some discussion at the time of the installation of three (3) catch pits to remedy the situation, however there would be a cost, and a further cost to restore the lost topsoil and reseed the area.
- 16. K Ltd indicated at the hearing that the cost to install the three catch pits and connect to the stormwater would be \$2,000.00 including GST and estimated that the cost for the topsoil and hydroseeding would be in or around \$5-6000.00 based on the previous invoice to do the complete grounds.
- 17. BS and WQ provided a quote for \$29,704.50 from [Drainage Company]. By comparison the quote includes removal of existing topsoil and clay and adding in 5 cesspits connecting them to the stormwater and additional work of the retaining wall before adding in topsoil and hydroseeding.
- 18. Based on suggestions to remedy by TI, a drainlayer, and the council, I find that the approximate cost to remedy could be the done with three catchpits connected to the stormwater connection, and the cost could be in or around the suggestion made by K Ltd. I further take into account the [Lawn Services Company] pricing was for the complete grounds that K Ltd relied on were from 2021. I expect the cost for the area to be remedied would have increased from 2021 and without updated information am satisfied that the price for the complete lawn might be sufficient to cover the partial lawn that needs remedying. Therefore, I find that BS and WQ are entitled to claim \$8,000.00 from K Ltd and T Ltd and the remainder of the claim is dismissed.

Referee: Nigel Wolland
Date: 2 November 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>.