



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 464

APPLICANT C Ltd

CO-APPLICANT D Ltd

RESPONDENT TR

The Tribunal orders:

TR is to pay \$6519.63 to C Ltd on or before 19 September 2023; and

D Ltd is to pay \$18,905.50 to TR on or before 19 September 2023.

Reasons

1. TR engaged B Ltd (now called D Ltd) to supply and install a fibre-glass swimming pool at her property. B Ltd's sister-company C Ltd was contracted to carry out the earthworks required for installation of the pool, having provided a written price to TR including terms and conditions in December 2020 (which she signed).
2. TR selected a pool at B Ltd's showroom in December 2020 – the pool colour was '[Pool Colour Design 1]' and its unique identifying number was written on the contract document at that time, although the contract was not signed until 19 January 2021 (which TR says was only because it took that long to get B Ltd's staff to correct some incorrect and missed-out details on the written contract). TR had paid the required \$5000.00 deposit on 5 January 2021 in order to secure the pool she wanted.
3. TR and the B Ltd salesperson originally discussed an install date of late February – TR was in the process of purchasing the property at which the pool was to be installed and settlement was to occur on 19 February 2021. She hoped that all required planning and consents would be in place by the time the property settled so that the pool installation could begin immediately upon settlement and well before winter when ground conditions would not be ideal.
4. However various delays meant that the Council consent application was not lodged until the end of January, and further delays, including a Geotech report being required by Council, meant that Council consent was not obtained until mid-April and that the first install date given to TR by B Ltd was at the end of June 2021 – they also advised that carrying out the earthworks in winter was not recommended, so the project was pushed out until spring 2021.
5. In September 2021 emails and phone calls between B Ltd's salesperson, NI, and TR were exchanged – B Ltd advised that 'your pool is in stock' and that an installation date was planned for the end of October. In early October NI informed TR of price increases and sent a document with revised prices, which TR reluctantly agreed to, communicating that the increase was disputed and writing "without prejudice" next to her signature on the updated contract.

6. The earthworks were carried out on 23 November 2021 and the pool installation occurred on 24 November 2021. C Ltd says it discovered on the 23rd that there was significantly more topsoil in the areas to be excavated than the Geotech report had indicated. C Ltd contacted B Ltd and TU urgently contacted TR with a price increase for C Ltd's work – a variation document for an extra \$11,000.00+GST was signed by TR and work continued on site.
7. The following day, the pool was installed in the afternoon (TR says she was off-site, though IP of C Ltd disputes this) and when she first saw the pool in the ground, it was not the pool colour she had selected and she immediately rang IP. That conversation became heated and IP ended the call.
8. C Ltd claims the unpaid balance of its invoiced amounts, being \$7888.13 incl.GST (the variation amount which turned out to be less than the \$11,000+GST increase signed for) plus the Tribunal filing fee (which cannot be awarded).
9. TR claims \$20,264.00, being a refund from B Ltd of the \$2137.00 price increase due to the delay, \$16,768.50 from B Ltd being 30% of the pool cost as compensation for a different pool being supplied without agreement, and \$1368.50 from C Ltd being costs incurred for site reinstatement.
10. The issues to be determined are:
 - *Was the variation for additional topsoil excavation justified, that is, should C Ltd have been able to predict the amount of topsoil present at and around the site based on the surrounding land contours?*
 - *What was the scope of the site preparation contract – did it include reinstatement?*
 - *Was B Ltd price increase of \$2137.00 justified?*
 - *Did B Ltd breach the contract by supplying a different pool to the one TR originally ordered?*
 - *If so, what damages are reasonable?*
 - *What is payable on the claim and counter-claim?*

Was the variation for additional topsoil excavation and extra hardfill justified, that is, should C Ltd have used more information than solely the Geotech report to assess excavation requirements for the pool?

11. IP says that on the day of excavation, 23 November, it was discovered that the clay-line was a lot lower than expected based on the Geotech report, so a lot more digging out of topsoil was required and a lot more infilling of Gap40 was needed, resulting in significant additional costs. Those extra costs were estimated at \$11,000.00+GST and were conveyed to TR urgently via TU of B Ltd.
12. The applicants provided text communication from that morning about the additional \$11,000.00+GST to which TR replied "All good [TU]. We authorise you to do the work and invoice us for the extra cost. Cheers [TR]". That was followed up by the sending of a more formal variation document which TR signed the same day. TR says the project had been delayed 8 months by that point so she felt she had no choice but to agree to extra costs on the day the work was to start.
13. TR also disputes C Ltd's interpretation of the Geotech report figures relating to the depth of topsoil and argues that C Ltd should have been able to predict the amount of topsoil present at and around the pool site based on the surrounding land contours. This is because the pool was to be installed in an area that had been the site of previous earthworks intended to create a flat building platform for a house on the property.
14. However I find that it was reasonable for C Ltd to rely on the Geotech report which was commissioned specifically for the purpose of the swimming pool install and which logged depths of soil type at various bore holes (to 2 metres deep) in the relevant locations. I accept C Ltd's

reading of the Geotech report in terms of which 'key' markings relate to topsoil as opposed to clay levels and therefore accept that the Geotech report shows topsoil depths of 100mm to 200mm (which is also explicitly stated on page 2 of the report). C Ltd have provided photographs of the dig once the topsoil had been removed showing greater depths than indicated in the Geotech report at two edges of the pool hole in particular.

15. C Ltd's terms and conditions specify that "C Ltd reserves the right to alter or amend any estimate upon notice to the customer where the alteration or amendment is due to an increase in the cost to C Ltd that is beyond the control of C Ltd". TR's argument in relation to surrounding land contours is not sufficient to prove that C Ltd should have been able to predict the additional costs incurred in spite of a Geotech report that indicated a thin layer of topsoil in the relevant locations. I therefore find that TR is liable to pay to C Ltd the actual invoiced cost of the earthworks variation, being \$7888.13.

What was the scope of the earthworks contract with C Ltd – did it include reinstatement?

16. While the contract does not specifically itemise site reinstatement around the pool in its costings, IP stated at the hearing that he would usually have carried out the reinstatement work that TR complained wasn't done, but that TR's landscaper said that he would be doing more work so just to leave the excess topsoil and he (the landscaper) would use it.
17. However TR provided photographs that show more extensive reinstatement work (in multiple areas) was required than moving some topsoil. She has also provided her landscaper's invoice for \$1368.50 for work described on the invoice as "To tidy up mess left behind by the pool contractor". Whatever conversation was had between the landscaper and IP, there was evidently no agreement for the landscaper to do the extent of reinstatement work that had to be done. I therefore find that \$1368.50 is payable by C Ltd on the counter-claim.

Was B Ltd price increase of \$2137.00 justified?

18. Early correspondence between the parties shows that TR was advised that there was a lead time of about 7 weeks from when Council consent is obtained to installation of the pool. Both parties put forward a lot of detail and some evidence about why various delays occurred and who caused them. The Council consent was finally obtained around 21 April 2021 so a June date for installation could have been expected.
19. However it seems to have been generally agreed that a winter date for installation was not ideal due to ground conditions, and a May date did not suit TR by that stage as she was having other work done at the property. A spring date was agreed and then the country went into lockdown in mid-August 2021.
20. I have the impression from all the evidence provided about delays that some of the delays could reasonably be attributed to B Ltd and some to TR. It is not possible to wind back time to work out what installation date could have been achieved if one or some particular delays had not occurred. It is also not known when price increases actually occurred across that year.
21. However, while the B Ltd contract does not use the word "quotation" or otherwise state that it is a fixed price contract, written communication between B Ltd's salesperson (NI) and TR on 21 December 2020 does. In an email, NI writes "The pool quote is now firmed up and not likely to change but as you are aware we have a price increase coming up and would like to have the above confirmed before this happens so you can have the pool at the now quoted price".
22. The final line of the above communication could arguably relate to the cost of the actual pool alone, which I note B Ltd charged at the 'quoted' rate in spite of a price increase by November 2021, but I prefer a broader interpretation because of the use of the wording "pool quote" at the beginning of the sentence. The pricing given by B Ltd was for the pool and all related components

so that is what made up the 'pool quote' referred to by NI. TR was paying for a completed pool and was promised, on the basis of signing the contract forwarded to her on 23 December 2020, that she could have the pool at the 'now quoted price'.

23. I therefore find that the price changes conveyed to her in early October 2021, which she signed on a 'without prejudice' basis in order to get the pool she had contracted for and waited for, are of no effect and that the original contract price is what was payable for the pool. B Ltd is therefore liable to refund \$2137.00 to TR.

Did B Ltd breach the contract by supplying a different pool to the one TR originally ordered?

24. There is no dispute that the pool actually installed at TR's property is a different colour to the pool she ordered (recorded on the contract dated 23 December 2020 as '[Pool Colour Design 1]').

25. The [Pool Colour Design 1] pool TR selected at her visit to B Ltd's showroom in December 2020 is mid-grey with blue and light-grey flecks throughout. The pool that was installed at her property is dark grey/black with spots of silver glitter and is overall more uniform in colour. TR says that she saw a similar pool at the showroom and did not like it because of the mirrored glitter effect.

26. B Ltd point out that the contract sent to TR in early October 2021 including the price increases records the new colour of pool ('[Pool Colour Design 2]') and that TR signed that contract. TU and IP seemed to believe that NI, B Ltd's salesperson, had discussed the change in pool over the phone with TR at some point, but NI was not available as a witness and there is no other evidence that would support that understanding.

27. On the contrary, TR says that she had phone conversations with NI at the end of September and she recorded her understanding of at least one of those conversations in an email to him on Wednesday 29 September 2021. In that email she writes

"Further to our conversation I would like to confirm the following:

[Pool Colour Design 1]

We're going for the glass filter please. [IP] to put in soak pit... etc"

28. There was no reply from NI to the effect that the [Pool Colour Design 1] pool was no longer available and there is no other evidence that she was ever told of the change in pool.

29. At the first hearing of this claim, TU and IP could not tell me what had happened to the pool TR had originally ordered even though it became the main issue in dispute the moment TR saw the pool in the ground on 24 November 2021. They took the opportunity during the adjournment period to investigate that issue and they returned to the second hearing explaining that by the time the original contract document was actually signed on 19 January 'that pool was gone'. Presumably it had been sold to another customer even though TR had paid a \$5000.00 deposit in early January to secure her choice of pool.

30. I find it astonishing that TR was not informed at the time of signing the contract or in the weeks or months afterwards, if the mistake was not realised immediately, that the pool she had contracted for was no longer available (as the last one had been sold and the colour had been discontinued). B Ltd says that the pool actually supplied is called '[Pool Colour Design 3]' (not [Pool Colour Design 2] as written on the revised contract later in the year) and they have provided evidence from the supplier to show that it has only 10% of the 'glitter' content of the 'Moonlight' colour which is the one they say TR did not like in their showroom. Regardless, the fact remains that the pool colours [Pool Colour Design 1] and [Pool Colour Design 3] are significantly different from each other (a sample of [Pool Colour Design 1] and photos of both samples were provided at the hearing).

31. The fact that '[Pool Colour Design 2]' was written on the revised contract in October 2021, rather than '[Pool Colour Design 1]' is in no way sufficient notice to TR that there has been a fundamental change in the nature of what is going to be provided under the contract. It is a basic principle of contract law that any significant terms or changes to terms from an existing contract must be explicitly pointed out. In this case, it would be easy for a customer to assume, if they noticed the difference in name at all, that [Pool Colour Design 2] was another name for [Pool Colour Design 1], just as B Ltd has used the name [Pool Colour Design 2] and [Pool Colour Design 3] interchangeably.
32. B Ltd's provision of the revised contract document dated 30 September 2021 with a change to the pool colour that had not been notified to TR (when B Ltd now say it had been known about by them since January/February) amounts to misleading and deceptive conduct, whether or not it was intentional, as well as a breach of contract since the original contract dated 23 December 2020 was the contract formed between TR and B Ltd. TR had specifically email NI on 29 September 2021 to confirm her understanding of a phone conversation regarding minor changes and had included in that email '[Pool Colour Design 1] pool'.

What damages are reasonable?

33. If TR had been notified before or soon after signing the contract in January 2021, she would have had the option to cancel the contract, but she only found out about the change after the pool was in the ground at her property (which is consistent with IP's account of the heated phone conversation he had with her that afternoon).
34. The nature of this contract and the fact that TR only became aware of the breach once the pool was in the ground, makes any kind of damages other than a reduction in value unrealistic, because even at the point when the pool had just been installed, it is unclear what kind of remedy taking the '[Pool Colour Design 3]' pool out again (which TR says she was informed by IP was not possible, but he disputes) would have resulted in, given that no [Pool Colour Design 1] pool was available.
35. B Ltd contend that the pool is nice-looking and fully functional. However TR had entered into a high-value contract for a particular pool and received something quite different, with part of the difference being that the pool received has distinct 'glitter' spots, a feature she disliked and rejected in another pool she viewed at the showroom. That breach is not able to be remedied without huge expense and disruption to her property. The colour of the pool is not a minor feature and the difference in colour between what she contracted for and what she received is significant. For these reasons I consider the 30% reduction in the cost of the pool shell charged (at the original price of \$55,895.00), that TR claims, to be an appropriate level of damages, being \$16,768.50.

What is payable on the claim and counter-claim?

36. C Ltd's claimed amount of \$7888.13 is set-off against the site reinstatement costs awarded on the counter-claim of \$1368.50, leaving an amount for TR to pay to C Ltd of \$6519.63.
37. As there were two separate contracts, the other amounts awarded on the counter-claim, a total of \$18,905.50, cannot be set-off against the outstanding balance payable to C Ltd because the \$18,905.50 is payable by D Ltd (formerly B Ltd).

Referee Perfect
Date: 22 August 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>.