



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

**[2023] NZDT 524**

**APPLICANTS      CC & TC**

**RESPONDENTS    BE & NE**

**The Tribunal orders:**

The claim is dismissed.

**Reasons**

1. CC & TC purchased a property from BE & NE at [Address] in June 2022 which included an in-ground swimming pool. They are of the view that the pool is not in reasonable working order as they say they have to top it up with around 40cm of water each week. They claim \$16,818.00 from BE & NE, being the cost to have the pool prepped, a fibreglass laminate applied to the whole pool, then top coated with gelcoat.
2. I adjourned the first hearing on 23 May 2023 to allow 1. CC & TC an opportunity to provide evidence from an independent professional scoping and detailing the issue with the pool and specifying remediation options. TC advised that following the last hearing they asked [Expert 1] (who gave the original quote) to do this but it was unwilling to have any further involvement. Since then CC & TC have been too busy to obtain a report, but in recent weeks they have received a quote from [Expert 2] to recoat the surface of the pool. CC & TC have also provided recent photos which show cracks in the fibreglass liner.
3. The issues to be resolved are:
  - a. Is there any vendor warranty in the Agreement for Sale and Purchase?
  - b. Did the Real Estate Agent make a representation regarding whether the pool was in operating condition? Verbal or advertisement.
  - c. If so, was that representation false?
  - d. If so, did it induce CC & TC to enter into the contract?
  - e. If so, are CC & TC entitled to \$16,818.00?

**Is there any vendor warranty in the Agreement for Sale and Purchase?**

4. The relevant law is the law of contract. When parties make promises to each other they must keep those promises. If they do not do so, they may have to compensate the other party to restore them to the position they would have been in had the promise been kept.
5. Clause 7.3 of the Agreement for Sale and Purchase (**ASP**) between the parties provides a warranty by BE & NE that '*... all plant, equipment, systems or devices which provide any services or amenities to the property, including, without limitation, security, heating, cooling or air conditioning are delivered to the purchaser in reasonable working order...*'
6. The question is whether this warranty extends to cover the lining of an in-ground swimming pool. I find that it does not. This is because the lining, being permanently adhered to the pool walls, is, like the walls, more akin to a structure than to 'plant, equipment, system or devices'. This is because plant, systems and devices all process something in some way. In contrast the walls and lining of the pool are static, rather like the paint on a house, and the ASP offers no warranty for such things.

**Did the Real Estate Agent make a representation regarding whether the pool was in operating condition? Verbal or advertisement.**

7. In general, the law applying to a private sale is that of caveat emptor, or 'let the buyer beware'. However The Contract and Commercial Law Act 2017 (**CCLA**) provides some protection for purchasers if there has been a misrepresentation by a seller and/or their agent. Section 35 of the CCLA provides that if a purchaser is induced to buy goods by a misrepresentation, whether innocent or fraudulent, they may be entitled to compensation.
8. A misrepresentation is a representation of present or past fact that is false. An opinion, or belief about the future is not usually a misrepresentation. A half-truth may be a misrepresentation, but silence is not usually a misrepresentation unless there is a duty to warn.
9. I find, on the balance of probabilities, that the marketing of the home by BE & NE's [Real Estate Agent] represented that the pool was in operating condition. This is because the advertisement clearly states '*... beautiful homestead ... complete with amazing gardens, tennis court and swimming pool for those hot summer days ...*' I find that a reasonable person would take this to mean that the pool was in a usable state as the statement is a strong suggestion that it can be used to cool off when the weather is hot. A reasonable person would comprehend that the pool was in operating condition as it would be of little use on hot summer days if it were not.
10. I have considered the written evidence of [Real Estate Agent] that the alleged verbal statement that he made, that '*the pool was in full working order*', is not how he makes statements regarding the status of a property or particular feature as he can never know for certain. I make no finding as to whether or not this statement was made as to do so would not affect the outcome of this claim. The advertisement stands alone in being a representation that the pool was in working order.

**If so, was that representation false?**

11. I have been unable to find, on the balance of probabilities, that the representation that the pool was in operating condition was false. I therefore do not find there was a misrepresentation.
12. This is for the following reasons:
  - a. CC & TC did use the pool last summer. It therefore was in 'operating' condition to some degree.
  - b. To what degree it was in operating condition is material. I acknowledge that CC & TC say they had to top it up by around 40cm of water each week, however find the reason they had to top it up has not been established to the standard required for them to be successful in their claim, which is on the balance of probabilities.
  - c. I have considered the [Expert 1] report which states that on 7 October 2022 it visited the property and found the pool had burst blisters leading to what appeared to be cracks around the pool. However [Expert 1] did not state that this made the pool un-operational, or that they

caused the water loss. It was for this reason that the last hearing was adjourned to give CC & TC an opportunity to provide evidence detailing the issue with the pool. They have not done this, and I advised that it would not be appropriate to adjourn the hearing again. Balancing their right to provide information and be heard against BE & NE's right for proceedings to be resolved in a timely manner, I find it would be unjust to grant a further adjournment as CC & TC have had adequate opportunity to provide information but have not taken that opportunity.

- d. In addition to CC & TC not meeting the standard of proof, I have considered BE & NE's view that as the pool never leaked before and due to the large quantity of water escaping it is likely that the bung was not properly inserted. BE gave evidence that if he had been advised of the escape of water he would have visited the property to check this as there is a knack to the bung, however he was never given this opportunity. I am therefore unable to exclude this as a possibility for the water loss.

13. As I have not found the representation to be false, I do not need to address the remaining two issues.

14. For the above reasons the claim is dismissed.

**Referee: L Thompson**  
**Date: 18 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>.