



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 428

APPLICANT EQ

RESPONDENT G Insurance

The Tribunal orders:

G Insurance Limited is to pay EQ the sum of \$30,000.00 on or before 3 October 2023.

Reasons:

1. In May 2022 the council performed a pool safety inspection on EQ's swimming pool and failed it due to the fencing. EQ was required to empty the pool until the fencing was repaired. EQ emptied the pool on 28 May. On 11-13 June there was a heavy rain event, the pool lifted at the deep end and was damaged. EQ filed a claim for the damage to the pool with his insurer, G Insurance.
2. In July 2022 G Insurance appointed an assessor who said it was likely that the pool lifted due to the water table rising and causing pressure in the ground to increase. The assessor indicated that this would need to be confirmed by an engineer. G Insurance did not organise an engineer's inspection. In November G Insurance informed EQ that it was declining his claim based on the assessor's opinion, as there is an exclusion for subterranean pressure in the insurance contract. In December 2023 EQ organised a geotechnical engineer's inspection and report, at his own cost. The report concluded that the pool lifted due to surface water flooding the drainage media around the pool. G Insurance maintained its decision to decline the claim but offered \$5,000.00 as a good will gesture in recognition of issues around the way it dealt with the claim. EQ declined that offer.
3. EQ claims the sum of \$30,000.00 towards the cost of replacing the pool.

The issue to be determined is whether the exclusion for damage caused by subterranean pressure applies to EQ's claim.

4. The insurance contract has an exclusion for "damage to any swimming pool caused by the ground shrinking or expanding, or by hydrothermal activity or subterranean pressure of any kind".
5. The geotechnical engineer's report states the following:

Based on the information provided by the client, and our observations carried out on site, we conclude that the pool has lifted due to a lack of confining pressure above the swimming pool

(caused by the partial draining of the pool) combined with flooding of the pool excavation during the June 2022 heavy rain event.

Due to the absence of any impermeable surface at ground level surrounding the pool, surface water from the heavy rain has been able to enter the sub-pool drainage media and flood the pool excavation. The subsurface drainage was likely unable to keep up with the flow of water into the excavation. If a hydrostatic release valve is present, this may have failed, allowing the pool shell to become buoyant, resulting in the observed lifting and damage.

The elevated position of the pool location in relation to the ground to the south, west and north, and the relatively low permeability of the soils in the area, would make a significant and rapid rise in the groundwater table unlikely within the short duration of the intense rainfall. We consider the flooding of the pool excavation much more likely to have been caused by surface water ingress into the drainage media as described above.

6. At the hearing G Insurance accepted these findings, agreeing that the drainage media surrounding the pool was flooded due to surface water draining into the excavated area, causing the pool to lift. G Insurance's representative argued that the subterranean pressure exclusion still applies. EQ argued that it did not. Subterranean pressure is not defined in the insurance contract.

7. EQ put forward the argument that subterranean pressure means pressure from the soil. He referred to the discussion of the term in the geotechnical report which says:

this is not a common term used in soil mechanics, but in our interpretation the term would be comparable to 'earth pressure' which is defined simplistically as "pressure exerted by a soil". This controlled by the soil's apparent internal angle of friction and apparent cohesion and is affected by soil water content.

8. While the geotechnical report refers to soil, it also states that it is not a common term used in soil mechanics. As it is not a common term used in the industry, it is not reasonable in interpreting the meaning to rely on an individual engineer's opinion of what the term would be comparable to.

9. G Insurance argued that as the term was not defined in the contract, it ought to be interpreted in accordance with the ordinary meaning of the words. EQ also accepted this approach.

10. The parties provided dictionary definitions of subterranean as follows:

Collins English Dictionary: situated, living, or operating below the surface of the earth.

Shorter Oxford English Dictionary: existing or living below the surface of the earth. Formed or operating under ground.

11. I consider that the ordinary meaning of the words is the appropriate way to interpret the clause. In discussion at the hearing, the parties agreed that the dictionary definitions indicate that the ordinary meaning of subterranean pressure would be pressure below the surface of the earth and is not necessarily limited to soil.

12. What constitutes the surface of the earth was discussed in some depth. G Insurance argued that the fibreglass pool shell is the surface of the earth, and that everything below that, including the drainage material is subterranean. EQ argued that the surface of the earth is what was the ground as it was left after the excavation work, and that drainage material is part of the structure of the pool that was placed on top of it. Both parties put forward detailed and plausible arguments as to why their interpretation of what constitutes the surface of earth is correct.

13. EQ also raised the contra proferentem rule, which requires that when there is ambiguity in a contract it ought to be interpreted more strongly against the party who drafted it.

14. I accept that there is some ambiguity as to how drainage material is defined in the contract. whether it is considered to be below the surface of the earth and therefore subterranean, or is

part of a structure that has been put on top of the surface of the earth, so not subterranean. G Insurance drafted the contract, so this ambiguity ought to be interpreted more strongly against it. For these reasons I find that the drainage material is part of the pool structure and is above the surface of the earth. As the flooding was in this area, I find that it is not proven that the pool lifted due to subterranean pressure, and the exclusion clause does not apply.

15. For these reasons G Insurance is to pay EQ the sum of \$30,000.00 by the date stated in the order.

Referee: K Rendall

Date: 14 September 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>.