



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 537

APPLICANT **GT**
APPLICANT **AI**
RESPONDENT **F Ltd**

The Tribunal orders:

Claim Dismissed.

REASONS

Brief Details of Claim

1. On 18 October 2021, AI and GT entered into an Agreement for Sale and Purchase to buy Lot X in a proposed new subdivision at [Address] from F Ltd. Settlement Date was to be 10 working days after the Vendor's Solicitor advised the Purchaser's solicitor that a search copy of the Title has issued.
2. Settlement Date was 25 May 2023, but Settlement did not occur until 19 June 2023.
3. On 4 October 2023, AI and GT lodged a claim in the Disputes Tribunal seeking payment of \$7,000 from F Ltd on the basis that F Ltd had placed soil and mulch debris on the section, and because the section was overgrown in part with scrub and long grasses and was not the grassed residential section they had expected.

Issues

4. The issues for the Tribunal to determine are:
 - (a) Whether F Ltd has failed to complete the subdivision in accordance with the Resource Consent;
 - (b) Whether it was an express or implied term of the contract that F Ltd would mulch and grass the section;
 - (c) Whether F Ltd has dumped soil and mulch debris on the section and if so, whether F Ltd is liable for the cost of removal.

Has F Ltd failed to complete the subdivision in accordance with the Resource Consent?

5. F Ltd was required by Clause 25.5 of the Sale and Purchase Agreement to complete the subdivision in accordance with the Resource Consent.
6. I find no proven failure to complete the subdivision in accordance with the Resource Consent for the following reasons:
 - (a) [Region] District Council ([RDC]) is responsible for ensuring compliance with Resource Consent Conditions. On 24 March 2023, RDC's JT certified that "some of the conditions of the subdivision consent have been complied with to the satisfaction of the [RDC] and that a consent notice has been issued in respect of those conditions that have not been complied with".

- (b) There is no evidence that F Ltd has failed to comply with any Resource Consent conditions with respect to land clearance, mulching, grassing or removal of soil.

Was it an express or implied term of contract that the section would be mulched and grassed?

7. An express term of contract is one that has been stated before or at the time the contract is formed. An implied term is one that is so obvious it goes without saying.
8. There is no express term in the Sale and Purchase Agreement which requires the vendor to mulch and grass the section.
9. I find no implied term of contract that the section would be mulched and grassed prior to settlement for the following reasons:
- (a) AI and GT say that this is a residential section, and that every other residential section they have purchased was grassed. In addition, the three other sections below the one they purchased at [Address] were grassed. However, they did acknowledge they had only purchased one residential section previously.
- (b) I have considered the nature and of location of this particular section. It is a steep section, known by AI and GT prior to purchase to be covered in scrubby growth. The section is completely different from the three flat sections below, which have been grassed. Furthermore, in BT's "Erosion and Sediment Control Plan" dated 15 December 2020, it says "The existing vegetation will be retained except where work is occurring". This document must have been available to AI and GT on line from RDC because they have submitted it. In my view, it is not at all obvious that this steep section bordered at the top by bush would be mulched and grassed prior to purchase.

Has F Ltd dumped soil and mulch debris onto the section and if so, is F Ltd liable for the cost of removal?

10. AI and GT claim that soil and mulch debris from elsewhere in the subdivision has been dumped onto the section, particularly at the top where a drainage swale has been formed.
11. HM (Director), who attended the hearing to represent F Ltd, said he was unaware AI and GT had any issues until receiving the Disputes Tribunal claim form. HM said that he and SD of [Engineering consultant] (the Project Manager, had inspected the site and found no evidence of the debris AI and GT describe.
12. HM said that the drainage swale above Lot X and other sections in the subdivision was constructed at the direction of RDC and inspected by them.
13. There are no photographs of the debris complained of, and no independent evidence of the debris AI described at the hearing.
14. I am not satisfied that there is any debris from elsewhere on the subdivision that has been dumped onto Lot X.

Outcome

15. The onus to prove a claim lies with the applicant. The standard of proof required in the Tribunal is "the balance of probabilities" which means more likely than not, more certainty than doubt.
16. AI and GT have not been able to prove to their claim to the required standard, and therefore it is dismissed.

Referee: J.F. Tunnicliffe

Date: 2 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>.